

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

2016 JAN 15 A 11:20 *qm*

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,)
(or his successor))
In their Official)
Capacities,)
)
Defendants.)
_____)

MEMORANDUM OPINION AND ORDER

NATURE OF THE CASE/HISTORY:

This case is now back before the Court on a motion of the remaining Plaintiffs, Aaron Belenky and Scott Jones, for summary judgment. On August 21, 2015, the Court sustained, in part, and overruled, in part, a pending summary judgment motion filed by Kris Kobach as

Kansas Secretary of State and that office's then Election Director, Brad Bryant. The result was that the Court found that one Plaintiff, Equality Kansas, lacked standing to pursue its claims and ordered dismissal of that entity, but stayed formal entry of judgment, pending full completion of this case. On the other hand, the Court found that Defendants' challenge to the standing of the other two Plaintiffs, Aaron Belenky and Scott Jones, should be overruled. The Court found that the individual Plaintiffs had sustained actual injury by the actions of the Secretary of State in that he had denied their respective right to be registered to vote and to vote unencumbered for state and local candidates in elections forward in their respective jurisdictions, as derived solely from their National Voter Registration Form, aka "Federal Form", registration, which they completed, respectively, on August 2, 2013 for Aaron Belenky and in July 2013 for Scott Jones.

Thereafter, and after this suit was filed, and but for unsolicited steps taken by the Secretary of State in response to this suit that also secured these two Plaintiffs' registrations to vote in state and local elections in 2014 and thereafter under Kansas's Safe and Fair Elections Act (SAFE), K.S.A. 25-2309 *et seq.*, these two Plaintiffs would have been denied their respective rights to vote in those state and local elections, while simultaneously having their respective entitlements to a secret ballot in regard to any votes cast for federal offices in the 2014 elections and thereafter, as secured by Article 4, § 1 of the Kansas Constitution, encumbered. The Court found the named Defendants engineered such a result solely based on these two Plaintiffs' personal choice to register to vote by way of the National Mail Voter Registration Form, aka, the "Federal Form", which method for registration is recognized and specifically authorized and accepted in Kansas by K.S.A. 25-2309(a).

The Court found these actions taken by the Defendants to limit and compromise the voting rights of these two Plaintiffs because of their personal election to register by way of the "Federal Form" were wholly *ad hoc* and *ultra vires* and without the authority of any Kansas statute and were clearly beyond the scope of any existing regulatory authority, if any, that had been exercised to such end by the Secretary of State. The Court found that, without some authority granted to the Secretary of State by the Kansas legislature, the Secretary's action premised a recurrence of such discriminatory status to "Federal Form" registrants generally and that, as to Plaintiffs, had annulled their right to register as they had chosen and could mislead, intimidate, and have a chilling effect on the Plaintiffs' exercise of their right to vote under the authority of their registration method. Further, these uncalled for impediments to the exercise of these Plaintiffs' voting franchise continued until long after this suit was filed and, then, thereafter, and

nevertheless, would have remained to compromise their voting entitlements "but for" the gratuitous and unsolicited efforts of the Secretary of State to secure their present statuses as registered under the Kansas Safe and Secure Elections Act. Even with such undesired assistance, the Court found that the Secretary's assistance was effective only so long as these two Plaintiffs never had occasion or need to re-register because of the statutory tenets of K.S.A. 25-2316c. The Court found each of these two individual Plaintiffs had suffered an injury in fact by the failure of the Secretary to give full effect to their choice to be registered by way of the "Federal Form" and that the Secretary's actions to secure their respective registrations under the Kansas's *Safe and Secure Elections Act* added no rights to those not otherwise fully possessed by way of the "Federal Form" registrants *under existing Kansas statutes and regulatory authority.*

The premises for these prior rulings of the Court are fully set out in the Court's August 21, 2015 *Memorandum Opinion* which this Court will not repeat here, but rather will, and does here, incorporate that *Opinion* herein in full in support of, and in explanation of its ruling on the Plaintiffs' present motion for summary judgment, which the Court finds should be sustained. Thus, only to be discussed here are any new or restructured arguments raised by the Defendants which might affect the accuracy or efficacy of the opinions reached in the Court's earlier August 21st *Opinion*.

The Defendants first challenge Plaintiffs' *Motion* on the basis that there are facts that the Defendants claim are material to a final ruling which require further discovery and/or do not stand as undisputed. At a conference held on September 25, 2015, the Court directed that the Plaintiffs' summary judgment motion proceed with briefing such that if facts could not be agreed to, the motion itself would identify the

materiality or need for further discovery. Notwithstanding, the Defendants filed motions in disregard of the Court's directive seeking further discovery. The Court finds these motions without merit. While the legal conclusions derived from the facts of record stand as disputed, the material facts relating to Plaintiffs Belenky's and Jones's attempt to register by way of the "Federal Form" and the timing thereof, their eligibility to do so, and the consequences visited upon them, or threatened to be visited upon them, merely by their choice of their method of registration, are not in material dispute. Neither is it disputed that Plaintiffs' opportunity to vote, if available and desired, in their respective residence districts in 2013 and thereafter was conditioned by the communications from local election officials who were following the Secretary of State's instructions. These communications advised the Plaintiffs that their attempts at registration, respectively, were incomplete. The fact that the Secretary's subsequent

instructions evidenced the discrimination that would have been visited upon Plaintiffs had they attempted to vote, both in terms of the limitation of ballot choices and the invasion of the sanctity of their ballots otherwise assured by the Kansas Constitution's Art. 4, § 1 guarantee of anonymity to their ballots cast merely because of their choice of registration method, is clear. Further, it seems clear that Plaintiffs' access to a ballot required subscription to an oath that they were properly registered, a proposition which all communications to them by election officials disputed. Hence, a suit to test the reach of voting rights under their registration method was obviously the safest choice. But for the Secretary's belated and uninvited interventions coming long after the filing of this suit that negated their choice of method to be registered to vote, the consequences that otherwise would have occurred unquestionably stand as undisputed.

The only material fact that can be considered as new and now in existence arises from the Secretary of

State's promulgation and adoption of a new rule - K.A.R. 7-23-15 - that freed both Plaintiffs Belenky and Jones from the requirement to re-register and provide proof of citizenship should they have moved out of state and then back again and they had again elected the "Federal Form" method to be registered and again declined to provide proof of citizenship. See K.S.A. 25-2316c. The Secretary of State acted under the authority of K.S.A. 25-2309(s) and K.S.A. 25-2355 in promulgating that latter regulation, however, it is to be noted that K.S.A. 25-2309(p) speaks to a waiver of a re-presentation of citizenship documents on re-registration, but has limited the waiver only for such residential moves *within the State of Kansas*.

Nevertheless, the fact that the Secretary's regulations now excuse the need for again providing proof on such a re-registration does nothing to impugn the fact that Plaintiffs' current registration status under the Kansas SAFE act was accomplished by the actions and choice of the Secretary, not at the choice of these two

Plaintiffs. Others registered by the way of the "Federal Form", but not so enthusiastically assisted by the Secretary, as were Plaintiffs, or otherwise fortunate enough to find legal assistance, would still, and regardless, remain compromised and discriminated against in their voting entitlements and the sanctity of their balloting choices would be threatened.

Accordingly, nothing advanced by the Defendants would reflect any compromise of Defendants' defenses nor is Plaintiffs' case bolstered by a lack of further discovery. As the Court noted in its August 21, 2015 *Opinion*, the disputed issue in regard to these two Plaintiffs was the reach and entitlement of their voting rights in Kansas when seeking to be registered by way of the "Federal Form". While true that the Defendants' unsolicited and gratuitous assistance to secure Plaintiffs' registration, also by way of the Kansas SAFE act requirements, has obviated a need for future equitable relief for these two remaining Plaintiffs, the Defendants cannot erase Plaintiffs'

past injury - the ignominy of having, and the now perpetual overruling of, their choice of how to lawfully be registered *under existing Kansas and federal law*. Nor can the Court ignore the inherent chilling effect of the communications from local election officials advising Plaintiffs that their registrations were incomplete, which would justify a resort to the courts for clarification, given the oath necessary to the exercise of their voting franchise due to the Secretary's categorization of their ballots as provisional. Only a maximum of 4.96% (less than 20 of 383) "Federal Form" registrants not providing proof of U.S. citizenship voted in the November 2014 general election. While the reasons for their non-voting is unknown, the very low percentage of those voting nevertheless stands out in comparison to the electorate as a whole which was 50.8% voting (887,023 of 1,744,866). See Defendants' Exhibit D: Affidavit of Bryan Caskey at ¶ 13.

Defendants next assert that the facts are insufficiently developed to sustain any claim of an overreach of existing state and federal law by the Secretary or to support any claim under the Court's analysis of Article 4, § 1 of the Kansas Constitution that resulted from the Secretary's actions in regard to "Federal Form" registrants not choosing to provide proof of United States citizenship. The difficulty with acceptance of Defendants' position here rests, in part, on the "should not", *i.e.*, admonitory, nature of the instructional prohibitions advanced by the Secretary as adequate to secure ballot secrecy to those required to vote by way of a "provisional" ballot. The Court has viewed the Secretary's exhibits that currently evidence the processes employed for provisional ballots. See Defendants' Exhibits D, E, E-1, E-2, E-3, F, F-1 and H. The Court notes that such voters are relegated to paper ballots. Oath or affirmation is necessary to obtain a ballot. See Exhibit E-3, pps. 95-112. None of these election

instructions instruct or require voter identification information to be removed prior to removing the ballot. While the Secretary has attached as an exhibit a draft regulation that imposes such a requirement, it is not now effective. See Defendants' Exhibit A at ¶ (2)(d). No provisions obviate the need for an oath or affirmation to obtain access to a ballot.

The Court has not overlooked the fact that the unauthorized disclosure of ballot information or voter identity can be a felony (K.S.A. 25-2422), but true anonymity only exists when no one knows how a vote was cast but the voter. Voting precinct personnel are often not indifferent strangers. The smaller the voting precinct, the more likely this is true. Merely having an on paper assurance that anyone having access to a voted ballot would not tell another of the vote may then represent only modest comfort. How apprehensive would Donald Trump be now if he had voted for Hillary Clinton for U.S. Senator in New York under

the same procedures that apply to provisional ballots in Kansas?

In the Court's view, such an invitation for intrusion on this protected seclusion, if it is to be had, can only be premised, if at all, on a legislative choice. The provisional ballot procedures do not reflect, therefore, true anonymity, but do reflect a *legislative choice* that some voter error or official error raise qualification questions that justify some intrusion. Here, as the Court has found, there has been no legislative choice that "Federal Form" registrants' ballots be so categorized, but, rather, it was the Secretary of State's sole initiative to so declare and invade the Kansas Constitution's Art 4, § 1 guarantee. Not material here, yet, ironically, where the legislature has so authorized, the legislature implicitly found the threat of felony prosecution for ballot disclosures to be a reasonable deterrent for the compromise of Art 4, § 1 ballot secrecy, but yet, in adding a documentary proof of citizenship requirement

to the registration process, necessarily found that the risk of a felony perjury conviction was insufficient to deter a fraudulent registration application.

Most importantly, the Defendants' position ignores the fact that *no Kansas law* sanctions a challenge to a ballot voted by a "Federal Form" registrant merely because they are a "Federal Form" registrant. "Federal Form" registration is adopted in Kansas as one method of registration (K.S.A. 25-2309(a)), a registration method for which the United State Supreme Court has held that any additional state requirements for proof of citizenship do not apply without advance approval and sanction by the Election Assistance Commission for federal elections (*Arizona v. Inter Tribal Council of Arizona, Inc.*, _____ U.S. _____, 186 L.Ed.2d 239, 133 S.Ct. 2247 (2013)).

But even beyond that, the Secretary has - by his failure to allow persons seeking to be registered by way of "Federal Form" registration to be placed in the registration books - created, *ad hoc*, an unsanctioned

method whereby those who have attempted to register by that method have not been entered in the registration books, yet, are, nevertheless, permitted a unitary ballot, but then are subjected to an immediate challenge to their vote pursuant to K.S.A. 25-409 and K.S.A. 25-414 as not qualified based on their non-registered status, the very status which the Secretary has withheld, and then, thereafter, their voted ballot is edited to count only votes for federal offices.

In Kansas, registration in one's area of residence is the foundational key to a voting entitlement for offices whose duties would affect that residence area. There is no such thing as "partial registration" to be found in the Kansas statute books. While the Secretary has authority over the maintenance and design of the registration books, including the power to issue rules and regulations in regard thereto (K.S.A. 25-2304) and, as well, to issue rules and regulations to comply with the National Voters Registration Act (K.S.A. 25-2355) and to implement the *SAFE* Act (K.S.A. 25-2309(s)), the

Secretary is not empowered to determine or declare the method of registration or create a method of "partial registration" only. In his Exhibit A, the Secretary, nevertheless, advances the draft of a regulation he has yet to adopt, which removes "Federal Form" registrants from his "suspense list" and declares them registered to vote for federal offices in federal election cycles, but still excludes the right to vote for all candidates or questions affecting those voters' respective residential areas - hence, a form of special registration, one not based only on voter residence.

In Kansas, a person is either registered to vote or he or she is not. By current Kansas Law, registration, hence, the right to vote, is not tied to the method of registration. The Secretary clings to K.S.A. 25-2309(1) as his authority which purports to require proof of citizenship as a precedent for *all* registrations to vote. However, as noted, by the *Inter Tribal* case, such state requirements are null and void for federal office elections until sanctioned by the

Election Assistance Commission, which has not been done and, in fact, has been specifically rejected. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014) *certiorari denied* (2015 WL1307634). Hence, K.S.A. 25-2309(a)'s authorization for the use and acceptance of the "Federal Form" as a valid, recognized means of registration should therefore stand as unfettered and uncompromised until the law is changed, hence, presently mandating such registrants to be entered into the registration books. The legislature has not yet changed the governing law. The Secretary of State is not a lawmaker, only an administrator of the law. As such, any challenge to a "Federal Form" registrant is *ipso facto* without legal foundation and merely a product of the Secretary's erroneous and *ultra vires* actions, whether issued through instructions or through rules and regulations.

Further complicating the Secretary's actions - beyond his flawed view of the purpose and entitlement granted by the chosen method of registration - is the

fact that the Kansas legislature has failed to authorize a separate federal office-only ballot (paper or electronic) for "Federal Form" registrants. Thus, even were, in fact, such character of separate or partial registration legislatively sanctioned, which it is not, such action - without authorizing a separate federal office-only ballot - would seemingly subject "Federal Form" registrant voters to discriminatory treatment in regard to their right to ballot secrecy secured by Article 4, § 1 of the Kansas Constitution and, hence, deny "Federal Form" voters the equal protection of Kansas law based merely on their choice of method of registration. Whether this latter could stand as a "compelling reason" need not be assessed, since no such choice has been made by the Kansas legislature. If the Secretary's flawed view of the propriety of permitting "Federal Form" registrants to vote a unitary ballot, yet then invade the ballot to edit the ballot cast, is allowed, a separate argument might be further raised that the separate treatment

ensuing defies the "accept and use" mandate to States underlying the federal law, the tenets of the *Inter Tribal* case, and the decision of the 10th Circuit in *Kobach v. U.S. Election Assistance Comm'n.*

The Secretary's directive to invade the ballots of "Federal Form" registrants is additionally flawed. To overcome this latter absence of authority - the lack of legislative authorization for a separate federal office - only ballot - the Secretary has sought the cloak of declaring these "Federal Form" voters' ballots as "provisional", notwithstanding his non-allowance of such registrants into the registration books, while yet allowing them to vote a federal office only portion of a unitary - all offices - ballot. As noted, his suggested draft regulation accepting "Federal Form" registrants as "registered" is one in name only since it still relegates their ballots to provisional status, notwithstanding.

This declaration of ballot status by the Secretary, like the premise on which it stands, lacks authority

and is flawed in its view of the legislative premise for a ballot to be authorized as "provisional".

Provisional ballots accommodate voter error or official error. To error means to make a *mistake*. Examples are voting, though properly registered, but in the wrong precinct; (K.S.A. 25-3302(a)(3)); voter error in failing to bring proper identification to the polling place (K.S.A. 25-2908(d)); or voter error based on such voter's mistaken belief that such voter was properly registered, but was actually not, or, otherwise, some *official error* in not placing such voter's name in the registration books. (K.S.A. 25-2908(e)). Here, the Secretary of State has, and is, by withholding the name and address of "Federal Form" registrants from entry into the local registration books, employed K.S.A. 25-2809(e) as the vehicle to declare "Federal Form" registrants' ballots as "provisional". However, since Plaintiffs and others using the "Federal Form" method of registration should have been entered as registered and accepted as registered, there was no error on the

part of the voter. Nor was the failure to place such voter in the registration books an official error as it was not based on a mistake, but, rather, such failure to enter such "Federal Form" registrants in the poll books was an intentional and manufactured one, hence, operating merely as a straw man as cover for the improper challenge that came next. The "suspense list", as substituted by the Secretary for proper entry into the registration books, facilitated a K.S.A. 25-2908(e) and K.S.A. 25-414(a) challenge and a resulting "provisional" ballot, hence, improperly creating a ballot that was subject to a loss of anonymity and treated differently from other registered voters, all to be accomplished through an intentional government design that was without proper legal premise. As noted, the Secretary's suggested regulation - Defendants' Exhibit A - would provide for registration, but registration in name only, not in substance. It would eliminate no existing discriminatory effect as

now occasioned by the Secretary's current and existing "instructions".

In the Court's August 21, 2015 *Opinion*, the Court noted that it had found no authority to partially count ballots for certain offices as the Secretary authorized and did for the 2014 elections by counting federal office only votes of "Federal Form" registrants. This was incorrect, as there is such authority in two instances, but both are based on voter error, not registration. K.S.A. 25-3002(b)(3) permits registered voters who vote in the wrong precinct to cast a provisional ballot and have their votes counted for all offices except those offices not otherwise within their proper voting precinct. K.S.A. 25-3002 otherwise prohibits internal ballot errors from invalidating the whole ballot, disqualifying only the vote for the office where the voter error appeared or where the voter's intention could not be determined. K.S.A. 25-3002 further identifies the rules governing the degree of acceptance or rejection of a ballot based on voter

error in voting or submitting his or her ballot. The statute applies to all ballots, not just provisional ballots, except, as noted, in K.S.A. 25-3002(b)(3). What the Secretary has done here can find no source in statute.

The heightened scrutiny given to rights under Art. 4 § 1 of the Kansas Constitution demands that laws or actions encumbering the privilege of voting be measured by a compelling reason, whether such actions are initiated by the legislative or executive branch of government. Clearly no such authority exists at all in the Kansas Secretary of State to encumber the voting process as he has done here. Simply, as the Court views it, the Defendant Secretary of State and his deputy, in their efforts to enforce their view of the law as they believe it should be, have advanced into the field of legislation because the Kansas legislature has yet to pave the way for implementation of the Secretary's views.

As all can agree, the issues raised by this case are highly important, even imperatively important. Their proper resolution affects the very democratic process of Kansas's elections. What this decision holds, and Plaintiffs clearly have standing to demand resolution, is that the Defendants simply had and have inadequate legal authority under either Kansas or Federal law to compromise or limit "Federal Form" registrants, such as the Plaintiffs, right to register and vote in Kansas elections, at least until the Kansas legislature acts, consistent with the Kansas Constitution and Federal law, to so permit. The Plaintiffs had and have standing to vindicate their choice of how to register to participate in our democracy. The Defendants' efforts to make the Plaintiffs' right of choice meaningless should be, and the Court has found is, unavailing to undermine their right to have that choice declared and vindicated. One's standing in court should not be hostage to the *ad hoc*, discretionary, transitory actions of an errant

government official, particularly in matters that touch upon the very essence of our democracy.

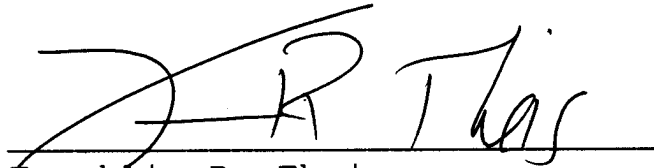
Accordingly, the Plaintiffs', Aaron Belenky's and Scott Jones's, Motion for Summary Judgment is sustained.

As indicated, at this juncture of the case no equitable relief appears appropriate for Plaintiffs, Aaron Belenky and Scott Jones, to request. Accordingly, declaratory relief is all that is accorded here as expressed in the foregoing *Memorandum Opinion*, which incorporates the Court's *Memorandum Opinion and Order* of August 21, 2015 as corrected by an *Order Nunc Pro Tunc* of this date. Unless Plaintiffs, Aaron Belenky and Scott Jones, or one of them, anticipate pursuing some further relief by way of amendment to their pleadings here, this case should now be concluded. Counsel for Plaintiffs should indicate to the Court and opposing counsel by formal communication no later than January 29, 2016, whether or not any further relief is to be sought in this case. If the

response is no, then, the Court will by separate order enter final judgment for the Plaintiffs, Aaron Belenky and Scott Jones, and against the Defendants, Kris Kobach as Kansas Secretary of State and Brad Bryant's apparent successor under new title, Bryan Caskey, as Deputy Assistant Secretary of State, Elections and Legislative Matters, in accordance with the foregoing *Memorandum Opinion*, which incorporates by reference the Court's *Memorandum Opinion* of August 21, 2015.

Correspondingly, at such time, judgment for the Defendants, and against the Plaintiff, Equality Kansas, will be entered for the reasons expressed in the Court's August 21, 2015 *Memorandum Opinion*. The Court intends to assess the Court costs of filing this case to the Defendants given the improper status accorded Plaintiffs, Aaron Belenky and Scott Jones, by the Defendants at the time this suit was filed.

IT IS SO ORDERED this 15th day of January, 2016.


Franklin R. Theis
Judge of the District Court
Division Seven

Attachment: *Order Nunc Pro Tunc*

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

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ORDER NUNC PRO TUNC

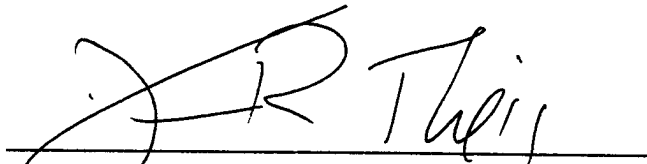
The Court's *Memorandum Opinion and Order* of August 21, 2015, is hereby corrected as follows:

On p. 1, l. 2, Belensky is corrected to Belenky.

On p. 13, l. 4, Belensky is corrected to Belenky.

On p. 18, l. 8, the reference K.S.A. 44-2309(a) is corrected to K.S.A. 25-2309(a).

IT IS SO ORDERED this 15th day of January, 2016.



Franklin R. Theis
Judge of the District Court
Division Seven

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