IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

MARVIN L. BROWN, JOANN BROWN, and CHARLES WILLIAM STRICKER III, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Case No. 2016-CV-550
vs.	)	
KRIS KOBACH, Kansas Secretary of State, in his official capacity,	)	
Defendant.	)	

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court upon the Motion for Permanent Injunction and Memorandum in Support thereof filed by the Plaintiffs, Marvin L. Brown, Joann Brown, and Charles William Stricker III (collectively, "Plaintiffs") on August 15, 2016. The Defendant, Kansas Secretary of State Kris Kobach ("Defendant") filed a Response on September 2, 2016, and the Plaintiffs filed a Reply on September 13. The parties presented oral arguments to the Court on September 21, 2016.

At the September 21, 2016, hearing the Defendant raised the issues of standing. Specifically the Defendant argued the issue of self-inflicted injury and whether the Browns possessed the documents outlined under K.S.A. § 25.2309(l). The Defendant requested discovery to address these issues. The Court ordered the parties to submit discovery plans which were received September 28, 2016. The plans were at odds and separate discovery orders were submitted to the court on September 30, 2016. The Court entered a limited and expedited discovery order on September 30, 2016. As of the filing of this Memorandum Decision and

Order the Defendant has not submitted a brief in support of his position after completing discovery. The Court has had no further correspondence or pleadings of any nature. Due to the rapid approach of the election date, the Court deems it necessary to finalize the request for permanent injunction.

The issues presented in the motions, briefing, and oral arguments are now ripe for ruling. After due and careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

The right of citizen suffrage forms the foundation of a democratic society. When this right is impeded by any operation whatsoever—be it by intimidation, fraud, confusion, disenfranchisement, or operation of oppressive barrier, whether instituted by the government or by other private citizens—the foundations of democracy are inevitably shaken. Likewise, whenever the laws of a state and the federal government clash with respect to this right, cracks are bound to appear in the framework of democracy. In response to one such crack—specifically, the federal district court injunction of May 17, 2016, which prohibited the application of K.S.A. 25-2309(l)'s documentary proof of citizenship ("DPOC") requirement "as to individuals who apply to register to vote in federal elections at the same time they apply for or renew a driver's license" and directing the Defendant to "to register for federal elections all otherwise eligible motor voter registration applicants that have been cancelled or are in suspense due solely to their failure to provide DPOC"—the Defendant attempted to apply a quick patch that, on its surface, purported to fix the problem by simply declaring that individuals who had registered using federal methods were deemed registered to vote in federal elections only. Just as a homeowner is ill-advised to patch a fractured foundation with duct tape, however, so too has the Defendant's temporary regulation led to additional challenges for all parties involved.

Specifically, following rulings from Division Seven of the Shawnee County District Court in the case of *Belenky v. Kobach*, Shawnee County Case No. 2013-CV-1331 ("*Belenky*"), and from the United States District Court for the District of Kansas in the case of *Fish v. Kobach*, No. 16-2105-JAR-JPO, 2016 WL 2866195 (D. Kan. May 17, 2016) ("*Fish*"), the Defendant proposed and adopted temporary regulation K.A.R. 7-23-16 ("the temporary regulation") on July 8, 2016. The State Rules and Regulation Board approved this temporary regulation on July 12, 2016. The temporary regulation, as adopted and approved, reads:

> K.A.R. 7-23-16. Processing voter registration applications and provisional ballots when no injunction is issued. (a) If a court interpreting the national voter registration act issues an injunction requiring that any individual who submits a voter registration application at an office of the division of vehicles, and who has not had evidence of citizenship confirmed pursuant to K.S.A. 23-2309(l) and amendments thereto, be permitted to vote in elections for federal offices, that individual shall be permitted to vote for federal offices only. The individual shall not be deemed registered to vote for any state or local office or on any ballot question until the individual has provided sufficient evidence of citizenship or evidence of citizenship has been obtained by the secretary of state or the relevant county election officer.
>
> (b) Each individual specified in subsection (a) shall cast that individual's votes for federal offices using a provisional ballot that contains all of the offices applicable in the individual's voting district. The votes on the provisional ballot shall be counted for federal offices only by the relevant board of county canvassers. Votes cast for other offices or on ballot questions shall not be counted.
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> (c) This regulation shall be deemed null and void if a court subsequently rules that Kansas may require evidence of citizenship pursuant to K.S.A. 25-2309(l), and amendments thereto, from each voter registration applicant who applies at an office of the division of vehicles, in order for the applicant to be permitted to vote in elections for federal offices.

Exhibit C to Declaration of Attorney Sophia Lin Lakin in Support of Plaintiffs' Motion for Permanent Injunction ("Plaintiffs' Exhibit C").

The Plaintiffs filed the instant case as a challenge to the legality of the temporary regulation, citing to the rulings issued in the *Fish* and *Belenky* cases. The Plaintiffs' initially sought a temporary injunction from this Court in order to prevent the enforcement of this temporary regulation during the Kansas August primaries, and the Court, though noting that both the *Fish* and *Belenky* cases were pending on appeal and, thus, not binding, granted a temporary injunction upon finding the reasoning in these cases persuasive, following a hearing before this Court on July 29, 2016.

On August 11, 2016, the Court formalized the injunction it pronounced from the bench by issuing a written Order Granting Temporary Injunction. In it, this Court adopted "Judge Theis' legal findings in *Belenky v. Kobach*, No. 2013CV1331 (Shawnee Cty. Dist. Ct.), and those findings of Plaintiffs in their memorandum in support of their motion that support this Court's findings that the dual registration system is prohibited." Order of August 11, 2016, at 3. The Court further ordered "that all provisional ballots that were so made or 'tagged' as a result of K.A.R. § 7-23-16 or the dual registration system be counted for federal, state and local elections." Order of August 11, 2016, at 7.

On September 9, 2016, the United States Court of Appeals for the District of Columbia Circuit entered an order in the case of *League of Women Voters of United States v. Newby*, later memorialized in an Opinion, No. 16-5196, 2016 WL 5349779 (D.C. Cir. Sept. 26, 2016) ["*Newby* Opinion"], which reversed the decision issued by the United States District Court for the District of Columbia on June 29, 2016. While the *Fish* litigation involved voters who had registered to vote at the Department of Motor Vehicles ("DMV"), the *Newby* case involved voters who had attempted to register via the "federal form" but, based on the unilateral action of Brian Newby—who, on January 29, 2016, approved the modifications to the federal form's

instructions requested by Kansas, Alabama, and Georgia, each of which asked that their state-specific proof-of-citizenship requirements be added to the list—were ultimately unable to do so. *Newby* Opinion, at *2. While the district court had, in that case, denied the affected would-be-voters' (two of whom are also the plaintiffs in the present case) request for a preliminary injunction, a majority of the United States Court of Appeals for the District of Columbia Circuit panel reversed this decision, granted a preliminary injunction, and "ordered that the Commission take "all actions necessary to restore the status quo ante," pending a determination on the merits, including informing the three states that Federal Form applications filed since January 29, 2016, should be treated as if they did not contain the now-stricken state-specific instructions." *Newby* Opinion, at *9.

The parties presented oral arguments to this Court on September 21, 2016. At that time, the Defendant raised new issues of fact and law regarding the Plaintiffs' standing to bring this action, and the Court, in an Order filed on September 23, 2016, ordered the parties to confer and produce a discovery schedule to resolve the factual issues in a timely manner. At the same time, the Court extended the temporary injunction set forth in the August 11 Order and modified it, to a degree, by ordering the Defendant to "instruct the local election officials to give timely notice to the voters impacted by the federal court rulings in [the *Fish* and *Newby* cases] . . . that they are deemed registered and qualified to vote for the appropriate local, state, and federal elections for purposes of the November 8, 2016 general election, subject only to further official notice." Order of September 23, 2016, at 3–4.

On October 7, 2016, the Court further modified the temporary injunction in order to avoid any conflict with Judge Robinson's Order of September 26, 2016. Specifically, this modification provided that affected individuals would be entitled to vote using standard ballots,

rather than provisional ballots, at either polling places on Election day or when they request advance mail-in ballots.

Subsequently, on October 19, 2016, the United States Court of Appeals for the Tenth Circuit issued an opinion in regard to the *Fish* litigation ("the Tenth Circuit Opinion") which affirmed Judge Robinson's temporary injunction in all respects. The Court takes judicial notice of the Tenth Circuit Opinion and will discuss it in more detail below, where relevant. As of this writing, the Court is unaware of any appeal the Defendant may attempt to bring before the United States Supreme Court, which makes the Tenth Circuit Opinion, for all intents and purposes, the federal courts' final word on the subject before Election Day.

The Kansas Court of Appeals, meanwhile, has yet to hear oral arguments in the *Belenky* case, and it is doubtful that that matter will be resolved prior to the probable sunset[1] of the temporary regulation on November 9, 2016.

In addition to the procedural facts above, the Court, further, sets forth the following findings of fact:

FINDINGS OF FACT

1. Defendant proposed and adopted temporary regulation K.A.R. 7-23-16 ("the temporary regulation") on July 8, 2016.
2. The State Rules and Regulation Board approved the temporary regulation on July 12, 2016.
3. The temporary regulation reads:

K.A.R. 7-23-16. Processing voter registration applications and provisional

[1] The Court observes that, per K.S.A. 77-422, the statute which authorizes temporary regulations, a state agency "for good cause . . . may request that a temporary rule and regulation may be renewed one time for an additional period not to exceed 120 days."

> ballots when no injunction is issued. (a) If a court interpreting the national voter registration act issues an injunction requiring that any individual who submits a voter registration application at an office of the division of vehicles, and who has not had evidence of citizenship confirmed pursuant to K.S.A. 23-2309(l) and amendments thereto, be permitted to vote in elections for federal offices, that individual shall be permitted to vote for federal offices only. The individual shall not be deemed registered to vote for any state or local office or on any ballot question until the individual has provided sufficient evidence of citizenship or evidence of citizenship has been obtained by the secretary of state or the relevant county election officer.
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> (b) Each individual specified in subsection (a) shall cast that individual's votes for federal offices using a provisional ballot that contains all of the offices applicable in the individual's voting district. The votes on the provisional ballot shall be counted for federal offices only by the relevant board of county canvassers. Votes cast for other offices or on ballot questions shall not be counted.
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> (c) This regulation shall be deemed null and void if a court subsequently rules that Kansas may require evidence of citizenship pursuant to K.S.A. 25-2309(l), and amendments thereto, from each voter registration applicant who applies at an office of the division of vehicles, in order for the applicant to be permitted to vote in elections for federal offices.

4. Pursuant to K.S.A. 77-422(c)(3), the temporary regulation expires on or about November 9, 2016, although "for good cause, a state agency may request that a temporary rule and regulation may be renewed one time for an additional period not to exceed 120 days."
5. Election Day falls on November 8, 2016.
6. The Plaintiffs each applied to register to vote in Kansas and attested, under penalty of perjury, to their eligibility to vote as U.S. citizens. Mr. Stricker applied while obtaining a driver's license at the DMV, while Mr. and Mrs. Brown each applied using the federal form.
7. None of the Plaintiffs submitted one of the forms of documentary proof of citizenship ("DPOC") set forth in K.S.A. 25-2309(l) to accompany their applications.

8. The administrative hearing alternative is too burdensome and vague to serve as an effective safety valve. Limited voters have availed themselves of this alternative.
9. Mr. Stricker has a birth certificate in his possession.
10. Each of the Plaintiffs was informed that they would not be considered registered and eligible to vote until they provided adequate DPOC.
11. As of September 1, 2016, approximately 18,611 individuals had applied to register to vote in Kansas without providing DPOC.
12. The Defendant reports that the Sedgwick County Election Office "has identified 25 noncitizens who successfully registered to vote before the law was implemented (including aliens who applied at the DMV), or who attempted to register and were prevented from doing so as a result of the SAFE Act." A document provided in the Defendant's submissions—Exhibit 1-B—contains a spreadsheet entitled "Sedgwick County, Kansas, Aliens Who Registered Prior to 1/1/2013 or Were Successfully Prevented From Registering After 1/1/2013." The document was "Amended April 2016," while the earliest incident on the list was identified on April 16, 2003, and, thus, covers a period of approximately 13 years.
13. The number non-citizen registrations are miniscule compared to the number of voters that potentially will be unable to vote.

STANDARD OF REVIEW

"Injunction is an order to do or refrain from doing a particular act. It may be the final judgment in an action, and it may also be allowed as a provisional remedy." K.S.A. 60-901. In order to obtain a *temporary* injunction, a party must establish: "(1) a substantial likelihood of eventually prevailing on the merits; (2) a reasonable probability of suffering irreparable future

injury; (3) the lack of obtaining an adequate remedy at law; (4) the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; (5) and the impact of issuing the injunction will not be adverse to the public interest." *Downtown Bar & Grill, LLC v. State*, 294 Kan. 188, 191, 273 P.3d 709 (2012).

In order to obtain a *permanent* injunction, however, "the plaintiff must actually succeed on the merits." *Steffes v. City of Lawrence*, 284 Kan. 380, 395, 160 P.3d 843 (2007) (quoting *Tyler v. Kansas Lottery*, 14 F.Supp.2d 1220, 1223 (D.Kan.1998)). In other words, "A plaintiff is required to show it actually succeeded on the merits of the lawsuit, i.e., after a final determination of the controversy." *Wolfe Elec., Inc. v. Duckworth*, 293 Kan. 375, 410, 266 P.3d 516 (2011). "Without such plaintiff success on the merits, the injunctive inquiry may end under Kansas law." *Steffes v. City of Lawrence*, 284 Kan. at 395.

CONCLUSIONS OF LAW

In this unique case, the Plaintiffs ask the Court to permanently enjoin the enforcement of a temporary regulation currently set to expire on November 9, 2016. Bizarrely, the validity of the temporary regulation is inextricably entwined with multiple other ongoing cases over which this Court has no jurisdiction (*i.e.*, *Fish* and *Newby*), and, to a lesser degree, with the ongoing *Belenky* litigation, although this case involves questions of law that were not present in *Belenky* and this Court is not required to hold this action in abeyance until a final resolution is reached in *Belenky*.

It may, initially, strike a casual observer as absurd to issue a permanent injunction over a temporary regulation. Moreover, a second paradox is written into the text of the temporary regulation itself, which contains an automatic self-destruct button in subsection (c): "This regulation shall be deemed null and void if a court subsequently rules that Kansas may require

evidence of citizenship pursuant to K.S.A. 25-2309(l), and amendments thereto, from each voter registration applicant who applies at an office of the division of vehicles, in order for the applicant to be permitted to vote in elections for federal offices." It cannot be ignored that, thus far, the federal court proceedings in *Fish* and *Newby* relate only to *temporary* injunctive relief—not permanent injunctive relief. Thus, it may well be that, notwithstanding the impending sunset of the temporary regulation, a *permanent* injunction would be premature, in this case, for even if the Plaintiffs do ultimately prevail on all other issues, an adverse federal court ruling at the permanent injunction phase of *those* cases might well torpedo the temporary regulation *anyway*.

However, ultimately, the case comes down to a simple question that, this Court is convinced, can only be answered by the Kansas judiciary: namely, under the law as it stands now, does the Defendant, as Secretary of State, have the power to create a two-tiered system of voter registration based upon the method by which a potential voter registers? In this Court's opinion, "actual success" on the merits, for the Plaintiffs, requires the Plaintiffs to establish this, and this alone—regardless of what federal rulings eventually present themselves.

A. Standing

As previously discussed the Defendant raised for the first time at oral arguments before this Court on September 21, 2016, the issue of standing. The Defendant argued that the Plaintiff's injury was a self-inflicted injury and thus the "threat of suffering injury" cannot be established. This Court believes this issue was answered by the 10th Circuit Court of Appeals in *Fish* when it opined:

> Moreover, our cases show that typically a finding of self-inflicted harm results from either misconduct or something akin to entering a freely negotiated contractual arrangement, not from a failure to comply with an allegedly unlawful regime. For example, in *Davis v. Mineta*, 302 F.3d 1104 (10th Cir.2002), we discerned self-inflicted

> harm because the defendant improperly entered "into contractual obligations that anticipated a pro forma result" from National Environmental Protection Act review. Id. at 1116; see also *Sierra Club v. Bostick*, 539 Fed. App'x 885, 890 (10th Cir. 2013) ("A close reading of *Davis* reveals that what lead us to brand the state defendants' harm with the 'self-inflicted' label, and decline to weight it, was the fact that the harm-inducing contractual conduct of those defendants . . . was predicated on the federal agency's improper actions, and the impropriety of those actions was attributable to the state defendants. . . . The state defendants expected a 'pro forma result' because they had been knowingly collaborating with the federal agency defendant while it improperly 'prejudged the NEPA issues.'"). Even the lone case cited by Secretary Kobach concerns harms caused by "the express terms of a contract [the plaintiff] negotiated," *Salt Lake Tribune Pulb'g Co. v. At&T Corp*., 320 F.3d 1081, 1106 (10th Cir. 2003), not harms caused by an allegedly unlawful state statute.
>
> In short, the circumstances that breathe vitality into the doctrine of self-inflicted harm are not present here. Moreover, we reject the notion that the source of an injury is a litigant's decision not to comply with an allegedly unlawful state regime, rather than the regime itself. *Cf. Meese v. Keene*, 481 U.S. 465, 475 (1987) (noting that "the need to take such affirmative steps to avoid the risk of harm . . . constitutes a cognizable injury"). Were this notion to apply in a case like this one, a court could never enjoin enforcement of an unlawful statute if the plaintiffs could have complied with the statute but elected not to; this hypothetical scenario borders on the absurd. *The Tenth Circuit Opinion* at Pg. 32. (2016 WL 6093990).

This Court finds the circumstances necessary for self-inflicted harm are not present in this case for the same reason espoused in *Fish*. Next, the Defendant argues the Browns do not possess the documents necessary under K.S.A. § 25-2309(l). The argument appears to be that Mr. Brown, a 91 year old veteran of the U.S. Armed Services and his wife Joann Brown are not U.S. Citizens or have no proof as outlined in K.S.A. § 25-2309(l). This Court granted the Defendant's oral motion for additional discovery to explain this argument. Depositions were ordered to inquire of Mr. and Mrs. Brown concerning their citizenship to be held on or before

October 21, 2016. As of November 3, 2016, nothing has been provided to this court to support the Defendants argument. Nothing has been provided to dispute the petition and information provided by the Plaintiff's that Mr. and Mrs. Brown are citizens and eligible to vote in the upcoming election. Based upon the inaction of Secretary Kobach and the time sensitivity of this action the Court finds the Defendant's argument has been abandoned and the Plaintiff's position that the Browns are citizens or can prove their citizenship is adequately supported by the evidence before the court. The Court finds the Defendant's argument as to standing are rejected and the Plaintiffs are found to have standing to continue this action.

B. Actual Success on the Merits

Again, the critical issue at the heart of this case is: does the Kansas Secretary of State have the authority to create, by regulation, a two-tiered voter registration system based upon the method by which a potential voter registers to vote? Plainly, Judge Theis concluded that the Secretary had no such power, and while this Court generally concurs with Judge Theis's analysis in *Belenky*—as noted in the August 11, 2016 Order—and, while the Court continues to find the *Belenky* opinion persuasive, the Defendant raises additional issues that were not present in *Belenky*. Specifically, the Defendant cites the powers assigned to his office by K.S.A. 25-2355, K.S.A. 25-2352, K.S.A. 25-124, and K.S.A. 25-2302 as valid authority that permits him to create a rule such as the temporary regulation which, again, creates two separate classes of registered voters: those who have registered for federal elections only (if only by the grace of a federal court order, as K.A.R. 7-23-16 plainly admits), and those who, by virtue of providing one of the forms of DPOC required by K.S.A. 23-2309(l), are registered for federal, state, and local elections.

Undoubtedly, K.S.A. 25-2309(l) expresses a legislative preference for DPOC as a prerequisite to voter registration. The problem, however, is that the National Voter Registration Act ("NVRA"), as interpreted by the *Fish* and *Newby* panels, does not. The Defendant candidly admits that the federal courts' interpretation of the NVRA "was not foreseen by the legislature." Defendant's Memorandum in Opposition, at 51. The question, then, is whether the Defendant actually has the power to create a two-class system of voter registration, in order to comply with the federal courts' interpretation of the NVRA, under one of the four statutes he identifies. In this Court's opinion, he does not.

The Kansas Legislature has stated that:

> It is the duty of all legally qualified voters to register to vote. Such registration, when made as provided in this act, shall entitle such voters to vote, if otherwise legally qualified. Such registration, if the same meets the requirements of this act, shall be prima facie evidence of the right of such voters to vote at any election held in the voting district where such voter resides.

K.S.A. 25-2302. While the Defendant points out that K.S.A. 25-2309(l) provides additional restrictions upon those attempting to register to vote, both the *Fish* and the *Newby* courts have restricted the application of K.S.A. 25-2309(l) towards individuals who registered, without providing DPOC, at either the DMV or via the federal form, as mandated by the NVRA. Thus, the question is not whether K.S.A. 25-2309(l) prohibits the Plaintiffs from being treated as registered to vote (plainly, it *would*, if given effect), but, rather, whether Kansas law contains a mechanism to apply K.S.A. 25-2309(l) partially to these affected voters—in effect, treating them as registered, by virtue of federal court orders, and as utterly unregistered in Kansas.

The Defendant has not pointed to any such statutory authority. The only statute either party has cited that directly addresses the question of "federal-only" registration versus "all-

election" registration is K.S.A. 25-2356. That statute, passed in 1996, provides that, "Any person registered to vote for federal elections during the period from January 1, 1995, through the effective date of this act shall be deemed to be registered to vote in all elections in Kansas, if otherwise qualified, upon the effective date of this act." Like a magician's trick, however, the impact of this statute changes based upon one's point of view. The Defendant points out that this statute at least suggests that the Legislature understands that there could, possibly be multiple levels of voter registration, *i.e.*, federal-only vs. all-elections. Defendant's Memorandum in Opposition, at 42. The Plaintiffs, however, argue that, even if that was true, K.S.A. 25-2356 demonstrates that, in the *only* instance in which the Legislature has ever voiced an opinion on the existence of multiple tiers of registration, it has chosen to treat all registered voters as registered for *all* elections notwithstanding the hypothetical alternative. Plaintiffs' Reply, at 30–31. In other words, as the Plaintiffs argue:

> This only confirms that the legislature intended to maintain a unitary registration, and it has never since suggested otherwise. Moreover, the "act" referenced in this provision, Laws 1996, ch. 187, is the act implementing the NVRA. K.S.A. § 25-2356 thus further suggests that in implementing the NVRA, the legislature believed that any one who is properly registered for federal elections pursuant to the NVRA, as DOV and Federal Form registrants are, should be treated as registered for all elections in Kansas.

Plaintiffs' Reply, at 31.

In this Court's view, the Plaintiffs have the more accurate view of this statute's impact on the case at bar. A tacit admission that a hypothetical alternative *may* exist does not compare with the express rejection of that hypothetical alternative in favor of a unitary system of registration. The Defendant's plain representation that the Legislature did not anticipate the reading given to the NVRA by the federal courts suggests the absence of an *intent* to change course from the

unitary system of registration prescribed by K.S.A. 25-2356, notwithstanding the Legislature's understanding that an alternative system might be hypothetically possible. In other words, K.S.A. 25-2356 does not provide the Defendant with a basis to change course on the Legislature's behalf.

Turning to the statutes the Defendant cites for actual authority to create rules and regulations, the Court first looks to K.S.A. 25-2355, which simply provides that: "The secretary of state may adopt rules and regulations to comply with the national voter registration act." The Defendant has identified this provision as the most direct legislative grant of authority in regard to the temporary regulation, and claims that such authority is extremely broad.

Regardless, the Legislature did not grant the Kansas Secretary of State unlimited power to issue rules and regulations in order "to comply with" the NVRA, and the rules and regulations he creates must still have some basis in statutory authority. Thus, while K.S.A. 25-2355 may justify the temporary regulation to the limited extent that it empowers the Defendant, as Secretary of State, to register the individuals covered by the federal court rulings in *Fish* and *Newby* to vote, it does *not* permit the Defendant to limit these individuals' registration to "federal-only" status. *That* is not a limitation found in the NVRA, but, rather, in the Defendant's interpretation of Kansas election law, and, thus, exceeds the Defendant's authority set forth in K.S.A. 25-2355.

Moving on, K.S.A. 25-2352(g) provides that "The secretary of state is hereby authorized to adopt such rules and regulations in the manner prescribed by law as may be necessary for the administration of the provisions of this section." The remainder of K.S.A. 25-2352 addresses registration of voters as part of application for driver's licenses or other nondriver identification. As the Defendant characterizes this "very broad" grant of authority, K.S.A. 25-2352(g) provides

him authority to "administer the registration process" and "to give effect to the Legislature's choice in how to secure the election process." Defendant's Memorandum in Opposition, at 34, 56–57. It strikes the Court, however, that the administration of the registration process does not constitute the creation of a new, multi-tiered system which the Legislature did not anticipate in order to comply with the Defendant's notion of how the Legislature would want things done. Had the Legislature provided for this eventuality in statute, the Defendant would be on good foundation to claim that he was merely administering registration pursuant to the statutes. Here, however, the Defendant plainly admits that the Legislature *did not* foresee this scenario—and, thus, while the Defendant may seek to give effect to his notion of the Legislature's *intent*, he lacks the authority to create new law in order to square the Kansas election statutory scheme with unforeseen federal court rulings that fly in the face of that scheme. That power, of course, lies only with the Legislature.

The Defendant also points to K.S.A. 25-124 as justification for the temporary regulation. This statute provides:

> County election officers, as defined in K.S.A. 25-2504, and amendments thereto, shall receive instruction relating to their duties in conducting official elections, including procedures for complying with federal and state laws and regulations. The form and content of the instruction shall be determined by the secretary of state.

Plainly, however, this is no help. If the Defendant lacks the authority to create a new legal status (*i.e.*, "federal-only" registrants) out of thin air, then he also lacks the authority to mandate that other election officials comply with the regulation that creates that new legal status. K.S.A. 25-124 does not provide the authority the Defendant requires.

Finally, the Defendant cites K.S.A. 25-601 for authority to prescribe the format of ballots. This provision contains nothing, in terms of authority to create a two-tiered system of

registration, that the other cited provisions did not. The ability to prescribe rules and regulations regarding ballot format has no bearing whatsoever on the Defendant's authority to, without express statutory support, create a system of partial registration for voters affected by the *Fish* and *Newby* litigation.

Accordingly, this Court echoes the conclusions it set forth in its Order of August 11, 2016. The Defendant simply lacks the authority to create a two-tiered system of voter registration. Lacking this authority, the temporary regulation cannot be enforced. Note that, even if the United States Supreme Court reverses the decisions in either or both of *Fish* and *Newby*, the result would *still* be that the Plaintiffs have "actually succeeded" on the merits of their claim, for, lacking these federal court rulings, the plain language of K.S.A. 25-2309(l) would stand as a barrier to the Plaintiffs' attempts at registering to vote without providing DPOC. On the first and most crucial factor, the Court finds in the Plaintiffs' favor.

C. The Remaining Criteria for a Permanent Injunction

In addition to actual success on the merits, the Plaintiffs must also demonstrate a reasonable probability of suffering irreparable future injury, the lack of obtaining an adequate remedy at law, the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party, and that the impact of issuing the injunction will not be adverse to the public interest. Without unnecessarily belaboring the point, the Court finds that all four additional criteria weigh heavily in favor of a permanent injunction.

There is no question that, should the Court refuse to grant a permanent injunction barring the application of the temporary regulation, the Plaintiffs will be prevented from voting. As the Tenth Circuit observed in its *Fish* opinion, "There can be no dispute that the right to vote is a constitutionally protected fundamental right." The Tenth Circuit Opinion, at *30. Moreover, a

vast number of affected voters—now more than 18,000—would also be prevented from exercising their right to vote in all state, local, and federal elections, should the Court find that the temporary regulation can be enforced. The unavoidable proximity to Election Day reinforces the certainty that these voters will, absent a permanent injunction, lose their ability to vote in all but the federal elections—a result which, given this Court's conclusions above, cannot stand.

Next, as the Court previously held, the Plaintiffs have no adequate remedy at law to prevent the enforcement of the temporary regulation. Nothing has changed, in this regard, to alter the Court's previous conclusions on this factor, as discussed in the Order of August 11, 2016, at 5.

Moving on, the Court remains convinced that the loss of the right to vote for more than 18,000 far outweighs any administrative difficulty the Defendant may face—which, at this point, should be precisely on the order of "none at all," as the temporary injunction has, for several weeks, required that the Defendant fully register all affected voters. Even when weighed against the 25 Sedgwick County individuals identified by the Defendant who attempted to register to vote *over a period of 13 years*, the denial of more than 18,000 individuals' right to vote far eclipses the Defendant's demonstrated—and undeniable—interest in a secure election. In other words, as the Tenth Circuit put it:

> We cannot ignore the irreparable harm of this denial of the right to vote, particularly on such a large scale. There is no contest between the mass denial of a fundamental constitutional right and the modest administrative burdens to be borne by Secretary Kobach's office and other state and local offices involved in elections. Nor does the negligible risk that a few votes might be cast by noncitizens alter our equitable calculus—especially given the certainty of irreparable harm to the rights of so many citizens.

The Tenth Circuit Opinion, at *33.

Finally, the Court finds that an injunction is, overwhelmingly, in the public interest. "There is no question that Kansas's interest in ensuring that not a single noncitizen (or an insubstantial number of them) should vote is in tension with the right to vote of over 18,000 Kansans." The Tenth Circuit Opinion, at *33. Moreover, while the Defendant undeniably has an interest in preventing illegitimate votes from being cast, he lacks the power to create new law to do so. That power lies only with the Legislature.

The Court finds that the Plaintiffs have met their burden to establish all five elements required for a permanent injunction. The Court, accordingly, enters an order permanently enjoining the Defendant from applying K.A.R. 7-23-16.

CONCLUSION

For the reasons stated above, the Court GRANTS the Plaintiffs' Motion for Permanent Injunction. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this ____ day of November, 2016.

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Hon. Larry D. Hendricks
District Judge

LDH/cld

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this ____ day of November, 2016, to the following:

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____
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