

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

STEVEN WAYNE FISH, et al.,

Plaintiffs,

v.

**KRIS KOBACH, in his official capacity as
Secretary of State for the State of Kansas,**

Defendant.

Case No. 16-2105-JAR-JPO

ORDER

On September 23, 2016, Plaintiffs filed a Motion to Enforce Preliminary Injunction; For Order to Show Cause Why Defendant Kobach Should not be Held in Contempt; and for Expedited Briefing and Hearing (Doc. 220). Given the time sensitive nature of this request, the Court proceeded to Order Defendant Kobach to appear on Friday, September 30, 2016 at 9:00 a.m., to show cause why he should not be held in contempt given the allegations set forth in Plaintiffs' motion that he is not in compliance with the Court's May 17, 2016 Preliminary Injunction (Doc. 129). Plaintiffs have submitted evidence that Defendant failed to register motor voter registrants as required by this Court's preliminary injunction, and that the notices he has sent to affected registrants are confusing and inaccurate.

On September 23, 2016, the Honorable Larry D. Hendricks, a district court judge in Shawnee County, Kansas, issued an Order in a related case requiring Defendant Kobach to, among other things,

instruct the local election officials to give timely notice to the voters impacted by the federal court rulings in *Fish v. Kobach*, No. 16-2105-JAR-JPO, 2016 WL 2866195 (D. Kan. May 17, 2016) (i.e. individuals who applied to register at the Kansas Department of Motor Vehicles without providing documentary proof of citizenship) *League of Women Voters of the United States v. Newby*, No. 16-5196, 2016 WL 4729502 (D.C. Cir. Sept. 9, 2016) (i.e. individuals who applied to

register to vote using the Federal Form without providing documentary proof of citizenship) be unequivocally instructed 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.¹

Defendant Kobach is hereby ordered to produce to this Court a draft of the notice required by Judge Hendricks' Order when he appears this Friday for the Show Cause hearing.

IT IS SO ORDERED.

Dated: September 28, 2016

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

¹*Brown v. Kobach*, No. 216-CV-550, Order at 4 (Shawnee Cnty. D. Ct. Sept. 23, 2016) (attached).

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

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX**

2016 SEP 23 A 11: 36

MARVIN L. BROWN, JOANN BROWN, and)
CHARLES WILLIAM STRICKER III, on)
behalf of themselves and all others similarly)
situated,)

Plaintiffs,)

vs.)

KRIS KOBACH, Kansas Secretary of State, in)
his official capacity,)

Defendant.)

Case No. 2016-CV-550

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 ("the Hearing").

At the Hearing, the Defendant raised a pair of new challenges to the Plaintiffs' standing to maintain this case. Briefly summarized—because the Defendant never briefed these issues—the Defendant now argues 1) that Mr. and Mrs. Brown have not demonstrated that they are United States citizens, and 2) that there has been no showing that the Plaintiffs, collectively, do *not* have access to the documents which would satisfy the requirements imposed by K.S.A. 25-2309(1). This latter argument is somewhat difficult to understand, but, in essence, the Defendant argues that, if the Plaintiffs had access to the documents otherwise required by K.S.A. 25-2309(1) but chose to register to vote without submitting those documents for inspection, they have

suffered, if anything, a “self-inflicted” injury, but not an injury-in-fact. Moreover, despite having never raised this issue previously, the Defendant now claims that additional discovery is required to resolve this dispute of material fact.

The Defendant is correct that standing, as a component of subject matter jurisdiction, can be raised “at any time.” *Ternes v. Galichia*, 297 Kan. 918, 921, 305 P.3d 617 (2013). With that said, by raising the issue of standing for the first time after all briefing has been completed, without any notice whatsoever of his intent to do so, and, further, without having actually provided any *law* in support of his argument that the Plaintiffs’ claimed injury is “self-inflicted” (or that a “self-inflicted” injury would be insufficient to obtain standing), the Defendant places this Court in a difficult position.

Consequently, in order to resolve this newly-raised dispute of material fact and newly argued point of law, the Court agrees with the Defendant that discovery is required. Additional briefing, however, is also required to resolve the Defendant’s second challenge to standing. To that end, the parties are directed to confer with one another and advise the Court by no later than Wednesday, September 28, 2016, of their intended discovery plan. The Court will establish a suitable briefing schedule such that the parties may set forth their arguments regarding standing, upon completion of discovery, at that time.

However, that does not end the matter. This Court has already issued a temporary injunction in this matter. That injunction was pronounced from the bench on July 29, 2016, and was memorialized in an Order filed August 11, 2016. Until such time as the parties have completed the requested discovery and submitted additional briefing or motions on the issue of standing, the Court will not, as a matter of equity, depart from the findings of fact and

conclusions of law set forth in the Order of August 11. Consequently, the temporary injunction set forth in that Order stands and is incorporated by reference, with these modifications:

1. The Court's Order that "all provisional ballots that were made so 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" is extended until such time as this Court issues its ruling on the Plaintiffs' Motion for Permanent Injunction, including up through the general election scheduled for November 8.
2. The Court's Order that "Local election officers will be immediately instructed by the Secretary of State to let all 17,500 or however many voters that are adversely impacted by the dual registration system and K.A.R. § 7-23-16 vote for all offices on the ballot and to count all the votes cast on those ballots" is extended until such time as this Court issues its ruling on the Plaintiffs' Motion for Permanent Injunction, including up through the general election scheduled for November 8.
3. The Defendant is further ordered to instruct the local election officials to give timely notice to the voters impacted by the federal court rulings in *Fish v. Kobach*, No. 16-2105-JAR-JPO, 2016 WL 2866195 (D. Kan. May 17, 2016) (*i.e.* individuals who applied to register at the Kansas Department of Motor Vehicles without providing documentary proof of citizenship) *League of Women Voters of the United States v. Newby*, No. 16-5196, 2016 WL 4729502 (D.C. Cir. Sept. 9, 2016) (*i.e.* individuals who applied to register to vote using the Federal Form without providing

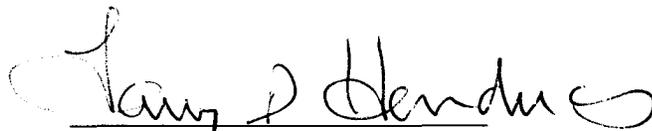
documentary proof of citizenship) be unequivocally instructed that they are deemed registered and qualified to vote for the appropriate local, state, and federal elections for purposes of the November 8, 2016 general election, subject only to further official notice.

This solution is far from ideal, but, then, so is the entire procedural posture of this case. The law favors final adjudication of a case on its merits. Had the Defendant raised his challenge to the Plaintiffs' standing in a more timely manner, rather than springing it upon the Court and the Plaintiffs at the Hearing with a mere 48 intervening days before election day—and, by the Defendant's representation, a mere 28 days before advance ballots can be cast—a final adjudication on the merits prior to election day—and with enough time to issue a comprehensive ruling that would both safeguard the interests of the State and mitigate the very real risk of voter confusion that may stem from all this eleventh hour legal wrangling—might have been possible. However, the Defendant did not timely raise this issue, thereby unavoidably delaying these proceedings. Therefore, given the highly unusual, time-sensitive, and fundamentally important nature of this litigation vis-à-vis the right of citizen suffrage, the most equitable solution, the Court is convinced, is to extend the temporary injunction set forth in its August 11, 2016 Order, as modified by the present Order.

The parties are directed to confer with each other and contact this Court by no later than Wednesday, September 28, 2016. The Court will establish a briefing schedule at that time.

IT IS SO ORDERED.

Dated this 23 day of September, 2016.


Hon. Larry D. Hendricks
District Judge

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 23rd day of September, 2016, to the following:

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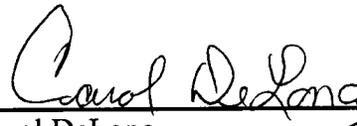
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