

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

KANSAS DEMOCRATIC PARTY, DNC
SERVICES CORPORATION/DEMOCRATIC
NATIONAL COMMITTEE, DSCC, and DCCC

Petitioners,

v.

SCOTT SCHWAB, in his official capacity as the
Secretary of State for the State of Kansas,

Respondent.

Case No. _____

PETITION FOR WRIT OF MANDAMUS

More than 10 months ago, the Kansas legislature passed a law—Senate Bill 130 (“SB 130”), codified as K.S.A. 25-2701(a)(1)—that sought to make voting easier for Kansas voters. It did so by giving county elections officials the discretion to allow citizens to vote a full, regular ballot when they appear to vote on election day, regardless of the polling location in which they cast their ballot in their home county. While this “Vote Anywhere” law leaves the ultimate decision of whether to implement this procedure in any given county to local elections officials, the law *requires* the Respondent Secretary of State (the “Secretary”) to establish rules and regulations for county officials to follow for such purpose.¹

Because the Secretary has failed to do so and has now made clear he will not do so in advance of the November 2020 election, Petitioners seek a writ of mandamus requiring the

¹ While it became known as the “Vote Anywhere” law, even where it is implemented, voters still must present at a polling location within their home county. In other words, the law allows for voting anywhere so long as the voter is within his or her county of residence.

Secretary to promptly comply with his plain duties under the law. Mandamus is appropriate, not only because the Secretary has a plain duty to issue the rules and regulations and has no discretion to decline to do so, but also because the Secretary's inaction threatens Petitioners' fundamental constitutional rights, this action concerns a matter of great public interest and concern, and because, as the Kansas Supreme Court has recognized, mandamus is an appropriate vehicle for obtaining an authoritative interpretation of the law for the guidance of public officials in their administration of public business.

In enacting the Vote Anywhere law, the legislature's clear intention was that that counties would have the discretion to offer voters the opportunity to vote a full, regular ballot at any polling location in the county by the 2020 election. The law became effective on April 25, 2019, after being published in the Kansas Register. Just two weeks ago, however, the Secretary publicly announced that he does not intend to issue the rules and regulations that the law requires he must in advance of the upcoming elections. And, it has since come to light that the Secretary has explicitly told county elections officials that they may not implement the law for the 2020 election—even if they are ready, willing, and perfectly able to do so.

The Secretary's failure to do what the law requires of him is in dereliction of his clear legal duties, and a writ of mandamus must issue to ensure that Kansas voters, including those among Petitioners' membership, are not disenfranchised as a result. The Secretary's assertions that the law requires complex rules and regulations and that it is too late to draft and impose standards to guide the counties in the implementation of the law cannot be squared with the irrefutable facts. The direct consequence of the Secretary's failure to act will be the disenfranchisement of thousands

of Kansas voters, most notably in highly local, down ballot races in which even a small number of votes may very well be decisive.

The procedure that the Vote Anywhere law authorizes—which would give registered voters the ability to vote a full regular ballot at any polling place in their county on election day—is already successfully in place in some counties during the early voting period known as “advance” voting. The Vote Anywhere law does nothing more than make the procedure available in counties where the local officials decide, in their discretion, to implement it, on election day. Before the legislature enacted this law, voters who presented at a precinct other than the singular precinct to which they are assigned on election day (i.e., “out of precinct”) were permitted to vote only a provisional ballot, which is segregated from the regular ballots and is ultimately less likely to be counted. Assuming an out-of-precinct election day provisional ballot is counted, it can only be counted for the races in that particular precinct for which the voter was eligible to vote because it is specific to the precinct in which it is voted. What this means is that when a voter casts a ballot out of precinct on election day, they are often disenfranchised in down ticket races. This occurs to thousands of voters across Kansas every election.

The legislature sought to fix this problem by enacting the Vote Anywhere law. But unless the Secretary is compelled by an order of this Court to act as the law requires, that disenfranchisement will persist into the 2020 election, even in counties that could easily implement the procedure on election day, with little or minimal administrative effort.

In support of their petition, Petitioners state the following:

I. JURISDICTION AND VENUE

1. This is an action in mandamus, pursuant to K.S.A. 60-801 *et seq.* This Court has jurisdiction pursuant to K.S.A. 60-801 *et seq.*

2. Alternatively, this is an action for declaratory and injunctive relief authorized by K.S.A. 60-1701, 60-1703 (declaratory relief) and K.S.A. 60-901, 60-902 (injunctive relief).

3. Venue is proper before this Court under K.S.A. 60-602(2).

II. PARTIES

4. Petitioner Kansas Democratic Party (“KDP”) is the official state Democratic Party for the State of Kansas, and it sues on its own behalf and on behalf of its membership and the candidates, voters, and elected officials with whom it associates. The KDP represents a diverse group of stakeholders, including elected officials, candidates for elected office, state committee members, advisory caucuses, affiliate groups, grassroots activities, and active voters. Its mission is to elect Democratic candidates to office across Kansas, up and down the ticket. Individual members of the KDP are injured by the Secretary’s inaction because he is essentially depriving them of one legally available option to vote. Candidates with whom the KDP associates for all offices other than state or county-wide offices are also directly harmed by the Secretary’s decision, which makes it highly likely that ballots that otherwise would have been cast and counted for those candidates by eligible voters will be lost entirely when voters appear to vote out of precinct on election day. The Secretary’s decision accordingly also makes it more difficult for the KDP and its members to associate to effectively further their shared political purposes. The KDP therefore

has both direct and associational standing to bring this case. The KDP has an interest in having its members vote by every avenue permitted by Kansas law.

5. Petitioner Democratic National Committee (“DNC”) is the governing body of the Democratic Party with its principal place of business in Washington, D.C. Its mission is to elect local, state, and national candidates of the Democratic Party to public office throughout the United States, including in Kansas, and it works directly with the KDP for this purpose. For the same reasons articulated above, the DNC has both direct and associational standing to bring this case. The DNC has a vested interest in ensuring that Kansas voters have every avenue to vote available to them as provided for by Kansas law.

6. Petitioner DSCC is the national senatorial committee of the Democratic Party as defined by 52 U.S.C. § 30101(14). Its mission is to elect Democratic candidates to the U.S. Senate, including for Kansas’s two senate seats. For the same reasons articulated above, the DSCC has both direct and associational standing to bring this case.

7. Petitioner DCCC is the national congressional committee of the Democratic Party as defined by 52 U.S.C. § 30101(14). Its mission is to elect Democrats to Congress, including for Kansas’s four congressional seats. For the same reasons articulated above, the DCCC has both direct and associational standing to bring this case.

8. Respondent, Scott Schwab, has served as the Secretary of State for the State of Kansas since January 2019. He may be served at the Kansas Secretary of State’s Office, Memorial Hall, 1st Floor, 120 S.W. 10th Avenue, Topeka, KS 66612-1594.

9. The Secretary holds public office and is delegated certain duties and responsibilities under Kansas law including specifically the duty to issue rules and regulations that the counties

must follow in implementing the Vote Anywhere law that is the subject of this litigation. K.S.A. 25-2701. The Secretary is required to exercise his public office and perform all duties and functions assigned to him by law. K.S.A. 75-414.

III. STATEMENT OF FACTS

10. During its 2019 session, the Kansas legislature sought to modernize Kansas voting procedure and make the casting of ballots in the state easier and more efficient.

11. Among other issues, the Kansas legislature sought to combat the problem that occurs when a citizen of a county attempts to vote at a location other than his or her assigned precinct. Historically, such voters have been made to vote a provisional, rather than a regular, ballot. Provisional ballots are typically not counted until after election day, if at all.

12. Provisional ballots are counted only after election day, and then, only for those races for which the voter would have been eligible to vote in his or her home precinct. This means that, absent the implementation of the Vote Anywhere law, voters voting out of precinct on election day will be disenfranchised in races that they are eligible to vote for, but which do not also appear on the ballot prepared specifically for the precinct in which they actually vote.

13. Most often, the impact of this will be most severely felt in the most local of races—in which the smallest number of voters are eligible to participate, and thus in which each individual voter's ballot carries more weight. Thus, if a county can provide a voter with his or her regular ballot on election day no matter the polling location where the voter presents to vote (as the Vote Anywhere law contemplates), the voter's choices will be reflected for *all* races for which he or she is eligible to vote.

14. The problem of out-of-precinct election day voting is not uncommon in Kansas. Thousands of voters have their ballots rejected, at least in part, as a result of voting out of precinct each election. In the 2018 election, 1,140 citizens of Sedgwick County were made to cast provisional ballots because they had voted at a location other than their assigned precinct on election day. During the presidential election two years earlier, the number was 1,717. For Johnson County, the number of provisions ballots cast because a voter arrived at the incorrect polling location was 783 and 964 in 2016 and 2018, respectively.

15. The burden of rejecting out-of-precinct election day ballots does not fall on all voters equally. It is more likely to disqualify the votes of those voters who have mobility issues or inflexible schedules, as well as what is often referred to as “low-information” voters (*i.e.*, those voters who, because of personal characteristics such as age or language barriers, or the communities in which they work and live, are less likely to be educated on or familiar with all of the aspects of the voting process, including the availability of advance voting, or how to accurately identify their individually-assigned precinct).

16. A shift worker who does not work close to his or her regular polling location, for example, may only be able to vote at the polling location closest to work during a lunch break, and may not have been aware of (or been able to travel to) advance voting options. In that instance, only a fraction of his or her votes on the provisional ballot will ultimately be counted.

17. To combat this problem, Senator Oletha Faust-Goudeau, along with other Kansas legislators, introduced SB 130 during the 2019 legislative session. Among other provisions, SB 130 expressly gives county elections officials the discretion to allow voters in their county to vote a regular ballot at any polling location on election day.

18. The Vote Anywhere law was broadly supported by members of the legislature, regardless of partisan affiliation. The House of Representatives passed SB 130 with a vote of 119 to 3. The next day, SB 130 passed the Senate with a vote of 38 in favor and 1 opposed. Governor Laura Kelly signed the bill into law on April 15, 2019, and the law went into effect on April 25, 2019.

19. As codified in Kansas law, SB 130 states in pertinent part:

The county election officer shall determine the area to be served by each voting place at every election and shall provide notice of such voting places as required by law. *At the discretion of the county election officer, all voters within a county may be allowed to vote at any polling location on election day*, provided all rules and regulations are followed as established by the secretary of state for such purpose.

K.S.A. 25-2701(a)(1) (emphasis added).

20. K.S.A. 25-2701 allows counties to transition away from traditional precinct-specific voting and to establish “voting centers” at which any citizen in the county may come to vote a regular, rather than a provisional, ballot on election day. In order to implement this change, counties must either (a) have voting machines on which all ballots for the county can be loaded or (b) multiple paper ballots available at the voting center.

21. Several Kansas counties have already implemented voting centers. Sedgwick County, for example, has utilized voting centers for advance voting since the 2008 election.

22. Sedgwick County utilizes electronic voting machines manufactured by Election Systems & Software onto which elections officials load all the applicable ballots for the county. Any registered voter who is a citizen of Sedgwick County can vote at any one of the County’s 17 advance voting centers. Once there, an election official will check the citizen’s identification and verify his or her address. Once the election worker has confirmed the citizen’s registration and

identity in the electronic poll book, the election worker will print out a slip of paper that identifies the correct ballot for the citizen. This slip of paper is fed into a voting machine, and the citizen is then able to vote his or her full regular ballot.

23. The Vote Anywhere law would permit Kansas counties like Sedgwick, at their discretion, to use the same voting center procedure on election day.

24. Sedgwick County Commissioner Jim Howell states that the process of implementing voting centers for election day would be as easy for the county as “flipping a switch.”

25. In the nearly 10 months since SB 130 became law, the Secretary and his office have not promulgated the regulations that would permit county elections officials the discretion to implement voting centers on election day, as required by the Vote Anywhere law.

26. On January 26, 2020, the Secretary gave an interview to Wichita Eagle reporter Dion Lefler. In that interview, the Secretary indicated that the process of implementing the regulations for voting centers will not be completed in time for the 2020 primary or general elections.² According to the article, the Secretary does not believe that the regulations can be crafted in time because of their complexity as well as other election administration concerns.

² Dion Lefler, *County lawmakers battle secretary of state over law saying where you can vote*, The Wichita Eagle (Jan, 26, 2020).

27. The Secretary's assertions in this regard have been publicly contradicted by at least one county commissioner, which has stated that implementing the law would be easy for Sedgwick County, and the Secretary's "idea—[that it] is going [to] take us to our knees—is ridiculous."³

28. Indeed, even if this matter were complex, as the Secretary claims, the Kansas Secretary of State's Office has previously proven to be fully capable of promulgating complicated regulations required of it by law in much less time than the Secretary claims his office now needs to comply with the Vote Anywhere law.

29. For example, the Kansas legislature mandated that the Secretary implement new rules and regulations for early voting during its 2011 legislative session. *See* K.S.A. 2010 Supp. 25-1122, as amended by L. 2011, ch. 56, sec. 2 (approved Apr. 11, 2011). The Secretary's office completed the full notice and comment rulemaking, as required by K.S.A. 77-421, within just ten months; the Secretary published the final rule—Kan. Admin. Regs. 7-36-7—in the Kansas Register on February 9, 2012.⁴

30. The Secretary also has the ability to issue temporary rules and regulations, quickly and easily, that would enable counties that stand ready and able to implement the Vote Anywhere law in the 2020 election to do so, and supplement or revise those rules and regulations to address more complex situations in the future. K.S.A. 77-422.

³ Associated Press, *Kansas' New Elections Chief Sparks Own Voting-Rights Dispute*, The New York Times (Feb. 12, 2020).

⁴ Vol. 31, No. 6 Kan. Reg. 198-99 (Feb. 9, 2012).

IV. GROUNDS FOR RELIEF

a. Writ of Mandamus under K.S.A. 60-801

31. Mandamus is available when a public official has failed to perform a clear legal duty. *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline*, 197 P.3d 370, 396 (Kan. 2008). The Kansas Supreme Court has also recognized that mandamus is appropriate under the following circumstances: where the state action at issue threatens to deny Petitioners of a right or privilege that exists as a matter of law and would be irreparably threatened absent mandamus, where the action concerns a matter of great public interest or concern, and to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public interest. *Alpha Med. Clinic v. Anderson*, 128 P.3d 364, 375 (Kan. 2006).

32. Mandamus is appropriate in this case for each of these four independent reasons: (1) the Secretary has a plain legal duty to act under the Vote Anywhere law, (2) Petitioners' interest in compelling the Secretary to perform his public duty arises out of injuries to the fundamental constitutional rights of Petitioners that will occur if this Court does not take action, (3) the Secretary's failure to act concerns a matter of great public interest and concern, namely, the rights of Kansans to have access to voting as the legislature intended, and (4) the Parties would benefit from obtaining an authoritative interpretation of the Vote Anywhere law from the guidance of the Secretary in their administration of public business in advance of the 2020 general election.

33. The Kansas legislature imposed an unambiguous duty on the Secretary to implement rules and regulations that would permit counties to allow voters to vote at any polling location on election day. K.S.A. 25-2701(a)(1) ("At the discretion of the county election officer, all voters within a county may be allowed to vote at any polling location on election day, *provided*

all rules and regulations are followed as established by the secretary of state for such purpose.”)
(emphasis added).

34. The statutory language gives county election officials, and not the Secretary of State, the discretion to decide whether to allow voters to vote at any polling location within their home county on election day.

35. Several Kansas counties—including Sedgwick County—have already implemented open precinct voting centers for advance voting, and have indicated that extending this practice to election day (as contemplated and authorized by the Vote Anywhere law) would be a simple exercise.

36. Some Kansas counties without the same resources as Sedgwick County would undoubtedly have more difficulty implementing the practice for election day, but K.S.A. 25-2701 gives the *county election officials*, and not the Secretary of State, the discretion to implement these practices for election day.

37. Nothing in the law empowers the Secretary to decide to delay implementation of the law for any reason.

38. The legislature intent was also clear. The bill’s sponsors wanted the discretion to be given to county elections officials for the 2020 primary and general elections; they did not empower the Secretary to make an independent decision as to whether the counties should be permitted to offer open precinct voting to its citizens on election day.

b. Violation of Sections 1 and 2 of the Kansas Bill of Rights

39. The Secretary’s refusal to allow counties the discretion to implement the Vote Anywhere law impermissibly burdens Kansans’ right to vote as protected by Sections 1 and 2 of

the Kansas Bill of Rights. The burden caused by the Secretary's inaction is not justified by sufficiently weighty states interests.

40. Because of the Secretary's refusal to allow counties the discretion to implement the Vote Anywhere law, if voters mistakenly present to vote at any voting location other than the specific precinct to which they were assigned, they face complete or partial disenfranchisement.

41. The Secretary's interest in not complying with the Vote Anywhere law does not justify that disenfranchisement.

c. Violation of Section 3 of the Kansas Bill of Rights

42. The Secretary's refusal to allow counties the discretion to implement the Vote Anywhere law also significantly inhibits Kansans' freedom of association as protected by Section 3 of the Kansas Bill of Rights and is not warranted by the interests the Secretary alleged to justify his refusal.

43. The Secretary's refusal to allow counties the discretion to implement the Vote Anywhere law infringes on Kansans' ability to associate with others on Election Day for the advancement of common beliefs.

44. The Secretary's interest in not complying with the Vote Anywhere law does not justify that infringement.

V. RELIEF SOUGHT

45. WHEREFORE, for the reasons stated herein, Petitioners seek the following relief:

- a. A Writ of Mandamus directing the Secretary to comply with his clearly defined duty imposed by K.S.A. 25-2701 and promptly implement the rules and regulations it requires.

- b. In the alternative, an order declaring the Secretary's refusal to implement the law a violation of the Kansas Constitution and an injunction permitting the counties the discretion to permit all voters in the county to vote at any polling location on election day, following the procedures already used to provide voters the same option during the advance voting period.
- c. Such further relief as this Court deems just and proper attributable to Respondent's refusal to perform his specific duties under the law.

Respectfully Submitted, this 14th day of February 2020.

/s/ Pedro L. Irigonegaray

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