

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

VERMIN LOVE SUPREME,

Plaintiff,

v.

KANSAS STATE ELECTIONS BOARD;
SECRETARY OF STATE KRIS KOBACH, in his
official and personal capacities; GOVERNOR JEFF
COLYER, in his official and personal capacities;
GOVERNOR'S CHIEF COUNSEL BRANT LAUE,
in his official and personal capacities; KANSAS
ATTORNEY GENERAL DEREK SCHMIDT, in his
official and personal capacities; and ELECTIONS
DIRECTOR BRYAN CASKEY, in his official
capacity.

Defendants.

Case No. 6:18-cv-01182-EFM-JPO

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Defendants Kris Kobach, Jeff Colyer, Brant Laue, Derek Schmidt, Bryan Caskey, and the State Elections Board, by and through their undersigned counsel, respectfully submit the following Response to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction (Dkt. #3):

I. - Introduction

In one month, voters across Kansas will gather to cast primary election ballots for various national and state offices, including the office of Attorney General. In preparation for that event, most counties have already sent their draft ballots off to the printer and printing has, or is about to, commence. Moreover, in compliance with federal law, hundreds of absentee ballots have already been sent to absent uniformed service members and overseas citizens. Many of these voters have already cast their ballots.

And under Kansas law, the State must transmit all of its remaining advance and absentee ballots in less than two weeks.

Now, on the eve of August 7, 2018, primary election, Plaintiff—a Massachusetts resident—brings this action seeking injunctive relief in the form of a court order requiring that his name be put on the ballot as a candidate for Attorney General. Presently before the Court is Plaintiff's motion for a preliminary injunction seeking that same relief. The Court should deny Plaintiff's motion because his claim is not likely to prevail on the merits and the relief would disproportionally harm the Defendants and be adverse to the public interest.

Plaintiff is not likely to prevail on the merits for an array of reasons. First, the Court lacks subject matter jurisdiction over half of his claims for relief. Second, Plaintiff was barred from the ballot pursuant to a constitutionally valid residency requirement, was afforded ample due process, and was not subjected to conduct that would shock the conscience of any reasonable person. On the contrary, Plaintiff sat on his hands as the state-law deadline to seek review of the ballot decision passed, and instead opted to file this federal action. Even if the Court does not share this reasoning, it should stay its hand with regard to claims over which it has jurisdiction pursuant to the *Pullman* and *Burford* abstention doctrines.

Granting Plaintiff's request for injunctive relief would disproportionately harm the Defendants because it would hinder Defendant's attempts to comply with federal and state election law regarding absentee and advance ballots. It would also render the State's ability to administer the upcoming election in a fair and efficient manner difficult, if not,

impossible. Indeed, if a state-wide reprinting of primary election ballots is ordered, the ability of counties to serve their voters during the primary will be severely jeopardized. To make matters worse, the drastic remedy of an injunction would increase the risk that voters will be confused or content to stay away from the polls altogether.

Not only are Plaintiff's underlying claims devoid of merit, but his lawsuit is an attempt, at the eleventh hour, to circumvent state procedural rules and use a federal court to upset the status quo, disrupt a state election, and interfere with Kansas voters' right to participate in an orderly primary. Such action should not be countenanced. On top of it all, the relief Plaintiff seeks is foreclosed by Supreme Court case law. For these reasons, Defendants respectfully request that the Court deny Plaintiff's motion for a preliminary injunction.

II. – Legal Standard Governing Requests for a Preliminary Injunction

"A preliminary injunction is an extraordinary remedy that may only be awarded upon a clear showing that the movant is entitled to such relief." *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1245-46 (10th Cir. 2017) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (internal quotation marks omitted)). This well-established standard requires that the movant meet four separate factors: (1) he is substantially likely to succeed on the merits; (2) he will suffer irreparable injury if the injunction is denied; (3) his threatened injury outweighs the injury that the opposing party will suffer under the injunction; and (4) the injunction will not be adverse to the public interest. *Fish v. Kobach*, 840 F.3d 710, 723 (10th Cir. 2016). Because this remedy is so extraordinary, it will only be awarded if the movant's right to relief is clear

and unequivocal. *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016).

Furthermore, certain preliminary injunctions are disfavored and thus require an even stronger showing by the movant. *Fish*, 840 F.3d at 723. These include (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. *Id.* at 723-24. In light of Plaintiff's requested relief here, this case falls squarely into all three of these categories, thereby heightening Plaintiff's burden. Any injunction would certainly alter the status quo given that Plaintiff's candidacy has been rejected due to his lack of Kansas residency. The relief sought (placement of Plaintiff's name on the ballot) is also a mandatory injunction. *See O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 979 (10th Cir. 2004) (en banc) (mandatory injunctions "affirmatively require the nonmovant to act in a particular way, and as a result they place the issuing court in a position where it may have to provide ongoing supervision to assure the nonmovant is abiding by the injunction.") And the injunction Plaintiff seeks would award him all the relief he has requested because, although Plaintiff asks for both injunctive relief and "damages" in his Complaint, the Eleventh Amendment forecloses his right to any monetary relief. Accordingly, Plaintiff must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms. *O Centro Espirita Beneficente Uniao Do Vegetal v.*, 389 F.3d at 975-76.¹

¹ Plaintiff argues that the Tenth Circuit employs a "liberal standard" when reviewing the movant's

III. – Argument

A. – Plaintiff is not substantially likely to prevail on the merits

1. – Court Has No Jurisdiction Over Plaintiff's § 1983 Claims Arising Under State Law

Plaintiff suggests that the jurisdictional hook for each of the six counts in his Complaint can be found in 28 U.S.C. §§ 1331 & 1343 and 42 U.S.C. § 1983. But Counts II, IV, and VI, by their express terms, are grounded exclusively in state law (i.e., the Kansas Constitution) and make nary a mention of any rights under federal law. The Court thus lacks subject matter jurisdiction over those claims.²

Federal-question jurisdiction exists for all claims “arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Similar language is also found in 28 U.S.C. § 1343, which confers jurisdiction on federal courts for civil rights violations and conspiracies that arise under federal law. “A case arises under federal law if its well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.” *Nicodeums v. Union Pac. Corp.*, 318 F.3d 1231, 1235 (10th Cir. 2003) (citation omitted). Subject matter jurisdiction is absent, however, where a suit is predicated entirely on state law. *Becker v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 770

likelihood of success. Pl.’s Mot. for TRO at 9. That is emphatically not the case. Plaintiff is referencing a “modified likelihood of success” standard that the Tenth Circuit has explicitly held has no application in the context of a preliminary injunction where the three disfavored factors referenced in the paragraph above are present. See *O Centro Espirita Beneficiente Uniao Do Vegetal v.*, 389 F.3d at 975-76.

² Courts in this District have alternatively dismissed 42 U.S.C. § 1983 claims that fail to identify a federal right under both Rule 12(b)(1) (for lack of subject matter jurisdiction) and Rule 12(b)(6) (for failure to state a claim). Compare *Matthews v. YMCA*, 2005 WL 2663218, at *4-5 (D. Kan. Oct. 19, 2005) (12(b)(1)), with *Robles v. Amarr Garage Doors*, 2012 WL 2359423, at *8 (D. Kan. June 20, 2012) (12(b)(6)). Regardless of which rule applies, the bottom line for purposes of Plaintiff’s motion for a preliminary injunction is that he cannot show a likelihood of success on these claims.

F.3d 944, 948-49 (10th Cir. 2014) (citing *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 116 (1936)); *Malek v. Haun*, 26 F.3d 1013, 1016 (10th Cir. 1994).

Nor is 42 U.S.C. § 1983 an independent basis for jurisdiction. Section 1983 does not create any substantive rights. It “merely provides relief against those who, acting under color of law, violate *federal rights* created elsewhere.” *Reynolds v. Sch. Dist. No. 1, Denver, Co.*, 69 F. 1523, 1536 (10th Cir. 1995) (emphasis added). Thus, to allege a claim under § 1983, a plaintiff must identify a specific federal right that was contravened.

Count II of Plaintiff’s Complaint asserts a free speech and freedom of association violation of Articles 1, 3, and 11 of the Kansas Constitution. Count IV asserts a substantive due process violation of Article 3 of the Kansas Constitution. And Count XI asserts a procedural due process violation of Article 2 of the Kansas Constitution. None of those claims allege violations of any federal constitutional or statutory right. Counts II, IV, and VI, therefore, have zero promise of success and will need to be dismissed upon Defendants’ subsequent filing of a motion to dismiss.

2. – *Defendants Have Eleventh Amendment Immunity from Plaintiff’s Claims Seeking Damages*

Plaintiff has sued Secretary of State Kobach, Governor Colyer, Attorney General Schmidt, Chief Counsel Laue, and Elections Director Caskey in both their official and individual capacities. To the extent any of these claims seek monetary damages – as Plaintiff’s Complaint clearly does in its Prayer for Relief – they are treated as suits against the *State of Kansas*, not the underlying officials, and are thus barred by the Eleventh Amendment. See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989) (“Suit against a state official in his or her official capacity is not a suit against the official but rather is a

suit against the official's office. As such, it is no different from a suit against the State itself.”); *Tarrant Reg'l Water Dist. v. Sevenoaks*, 545 F.3d 906, 911 (10th Cir. 2008) (when “requested relief is akin to a retrospective damages award . . . the Eleventh Amendment prohibits the federal suit”); *Rounds v. Clements*, 495 Fed. App'x 938, 941 (10th Cir. 2012) (Gorsuch, J.) (“What matters under our received Eleventh Amendment jurisprudence isn't the capacity in which the officer is sued, but the nature of the wrong alleged and the remedy sought.”)

Because there has been neither consent by the State nor congressional abrogation of any Eleventh Amendment immunity enjoyed by the State, all of the claims seeking monetary damages here must be dismissed for lack of subject matter jurisdiction. *See Elephant Butte Irrigation Dist. v. Department of Interior*, 160 F.3d 602, 607 (10th Cir. 1998) (Eleventh Amendment precludes suits against a state in federal court commenced by citizens of that state or citizens of another state, in the absence of consent or congressional abrogation) (citing *Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890)).

3. – *Plaintiff Lacks Standing to Assert Claims Against Defendants Colyer, Schmidt, and Caskey*

It is true that Eleventh Amendment immunity generally does not extend to federal suits against state officials where a plaintiff seeks only prospective, injunctive relief for violations of federal law. *Will*, 491 U.S. at 71 n.10; *Sevenoaks*, 545 F.3d at 911. In such circumstances, the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), is implicated and the claim for injunctive relief is allowed to proceed on the theory/legal fiction that, when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. *Virginia Office for*

Protection and Advocacy v. Stewart, 563 U.S. 247, 255 (2011). But while the Eleventh Amendment may not impede Plaintiff's pursuit of injunctive relief on these claims, his inability to establish standing to assert claims against Governor Colyer, Attorney General Schmidt, and Elections Director Caskey necessitates their dismissal.³

As the party seeking to invoke federal jurisdiction, Plaintiff has the burden of establishing standing. *Petrella v. Brownback*, 697 F.3d 1285, 1292 (10th Cir. 2012). To demonstrate standing for purposes of Article III jurisdiction, a plaintiff must show that (a) he has suffered an injury in fact, (b) the injury is fairly traceable to the challenged action of the defendant, and (c) it is likely that the injury will be redressed by a favorable decision. *Cressman v. Thompson*, 719 F.3d 1139, 1144 (10th Cir. 2013) (citations and internal quotations omitted).

As an initial matter, there is no basis whatsoever for subjecting Governor Colyer to any liability here. Indeed, the governor is not even part of the statutory objection process about which Plaintiff complains. The three state officials involved in the process set forth in Kan. Stat. Ann. § 25-308(c) are the Secretary of State, Attorney General, and *Lieutenant Governor*. Governor Colyer did previously serve as Lieutenant Governor, but he was elevated to his current office on January 31, 2018 (following the resignation of Governor Brownback), long before any of the issues in the case at bar came to pass.

Attorney General Schmidt, meanwhile, expressly recused his office from the hearing in which Plaintiff's candidacy was rejected. And Elections Director Bryan Caskey

³ Of course, as described in detail elsewhere in this Response, Plaintiff cannot show a likelihood of success sufficient to warrant preliminary injunctive relief even against those Defendants for whom there is not a *jurisdictional* bar.

(whose real title is Assistant Secretary of State for Elections and Legislative Matters) is not a member of the State Elections Board and played no role whatsoever in the decision to reject Plaintiff's candidacy. Plaintiff, therefore, cannot possibly show that any of his alleged injuries are attributable to the actions of these individuals.

4. – Plaintiff's Procedural Due Process Claims Have No Merit

Turning to the merits, Plaintiff claims in Count V that Defendants violated his procedural due process rights under the Fourteenth Amendment by "arbitrarily" disqualifying him from the ballot and utilizing a candidate eligibility objection process that purportedly confers unfettered discretion upon the decision-makers involved in the process. In determining whether an individual's procedural due process rights have been violated, the Court employs a two-step test: (1) did the individual possess a protected property interest to which due process protection was applicable?; (2) if so, was the individual afforded an appropriate level of process? *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006). Plaintiffs' cause of action fails at both steps.

As an initial matter, Plaintiff has no federally protected interest in appearing on a ballot to be a candidate for Attorney General. In order for a person to have a procedural due process claim, he must have been denied life, liberty, or property protected by the Fourteenth Amendment. *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1253 (10th Cir. 1988). But there is no constitutional right to run for state office. *Snowden v. Hughes*, 321 U.S. 1, 6-7 (1944). While the contours of procedural due process have evolved over the last fifty years, federal courts have consistently held that there is no Fourteenth Amendment federally protected property interest in serving in a public office or in appearing on a

ballot therefor. *See Mitchell v. King*, 537 F.2d 385, 391 (10th Cir. 1976) (citing *Abeyta v. Taos*, 499 F.2d 323, 327 (10th Cir. 1974)). *Accord Wilson v. Birnberg*, 667 F.3d 591, 597 (5th Cir. 2012); *Velez v. Levy*, 401 F.3d 75, 86-87 (2d Cir. 2005); *Burks v. Perk*, 470 F.2d 163, 165 (6th Cir. 1972); *Moncier v. Haslam*, 2014 WL 4680897, at *4 (E.D. Tenn. Sept. 19, 2014) (“no federally protected interest in appearing on a ballot to be a candidate for state-court judge.”); *Ford v. Donovan*, 891 F. Supp.2d 60, 66 (D.D.C. 2012) (“Just as an elected official has no cognizable property interest in the office he holds, neither does a candidate for public office have a property right in any prospective office.”).

Furthermore, even if Plaintiff did have a federally protected interest in access to the ballot, he was afforded adequate due process. “The essence of procedural due process is the provision to the affected party of *some* kind of notice and *some* kind of hearing.” *Moore v. Bd. of County Comm’rs*, 507 F.3d 1257, 1259 (10th Cir. 2007) (citing *Zinerman v. Burch*, 494 U.S. 113, 127 (1990)). Here, the same day that Plaintiff filed his declaration of intent to run for Attorney General – June 1, 2018 – an objection was lodged to his eligibility. *See* Pl.’s Mot. for TRO at 5-6. A prompt hearing was then convened just ten days later before the State Objections Board. *Id.* at 6. Plaintiff was given the opportunity to, and did, appear with his counsel (telephonically) to make his case. The State Objections Board issued its decision that very day at the conclusion of the hearing. *Id.* at 7-8. (It later memorialized its decision in a written opinion dated June 27, 2018. *See* Ex. A.) And Plaintiff had a statutory right to appeal from that adverse decision, *see* Kan. Stat. Ann. § 25-308(f), even though he affirmatively elected not to take advantage of that right. In short, Plaintiff was provided with both pre- and post-deprivation hearing

opportunities. He thus received all the due process to which he was entitled.

This case is similar to *Rivera-Powell v. N.Y. City Bd. of Elections*, 470 F.3d 458 (2d. Cir. 2006). There, an aspiring judicial candidate submitted a deficient petition for her nomination. *Id.* at 463-64. The New York Board of Elections held a hearing, at which the aspiring candidate's attorney appeared, and the board determined that she should be removed from the ballot. *Id.* The aspiring candidate contested her removal from the ballot by seeking judicial review, pursuant to state statute. *Id.* at 464. But her petition for review was dismissed for lack of jurisdiction because her complaint was defective. *Id.* Rather than appealing that case, the prospective candidate brought an action under 42 U.S.C. § 1983 asserting, among other things, that her procedural due process rights had been violated. The Second Circuit disagreed. The Court noted that by virtue of the board's hearing and the right to seek judicial review, she had been afforded ample due process of law. *Id.* at 466-67.

The same is true here. Before Plaintiff received an adverse decision, he was given the right to a hearing. And after he received an adverse decision at that hearing, he had the right to contest that decision via a mandamus proceeding in state district court. *See* Kan. Stat. Ann. § 25-308(f). Plaintiff cannot ask for more.

To the extent Plaintiff is also challenging the *structure* of the State Objection Board given the presence of the Attorney General on the Board, his argument must fail. As an initial matter, the Attorney General – in an abundance of caution – recused his office from Plaintiff's hearing and the other two members both voted to reject Plaintiff's candidacy. So Plaintiff suffered no conceivable injury. In any event, it is quite commonplace for an

executive branch official to be vested by statute with responsibility for overseeing a governmental function with which he may have a personal interest. For example, the Secretary of State is the chief election official in nearly every state and is charged with administering the electoral process, including elections in which he is running for office himself. No court, as far as we can tell, has ever found any constitutional infirmity with this structure. After all, the voters have elected these individuals to public office knowing the full range of responsibilities entrusted to them. Confounding hypotheticals might be surmised, but they are irrelevant here. In sum, Plaintiff has demonstrated no likelihood of success on his procedural due process claim.

5. – Plaintiff's Substantive Due Process Claim Is Meritless

In Count III, Plaintiff also advances a substantive due process claim under the Fourteenth Amendment. This claim fails for multiple reasons. First, the Supreme Court has repeatedly held that “[w]here a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.’” *Stop the Beach Renourishment, Inc. v. Florida Dep’t of Envtl. Prot.*, 560 U.S. 702, 721 (2010) (citing *Albright v. Oliver*, 510 U.S. 266, 273 (1994)). The thrust of Plaintiff’s claims in this suit are rooted in the First Amendment and procedural due process. These provisions, therefore, must be the Court’s sole guideposts. *See Wilson*, 667 F.3d at 599 (dismissing plaintiff’s substantive due process challenge to his exclusion from the ballot in light of his First Amendment, procedural due process, and Equal Protection Clause causes of action); *Velez*, 401 F.3d at 94 (same); *Jolivette v. Husted*, 886 F.

Supp. 820, 827 n. 3 (S.D. Ohio 2012) (same).

Second, on the merits, Plaintiff's substantive due process claim falls far short of establishing a viable cause of action. To prevail on such a claim, Plaintiff would have to show that Defendants' decision to disqualify him as a candidate for Attorney General "shocks the conscience" of this Court. *Dias v. City and County of Denver*, 567 F.3d 1169, 1181-82 (10th Cir. 2009); *Ward v. Anderson*, 494 F.3d 929, 933 n.5 (10th Cir. 2007). It is difficult to fathom how the State Objections Board's actions in rejecting Plaintiff's candidacy for lack of state residency could shock any reasonable person's conscience considering that the Board explicitly relied on an opinion of the Shawnee County District Court, issued less than two weeks prior to Plaintiff's hearing, in which the court held that Kansas law does impose state residency requirements for candidates for governor and lieutenant governor, and (ii) many of the statutes that the state trial court analyzed in finding a state residency requirement for gubernatorial and lieutenant gubernatorial candidates also apply to candidates for Attorney General. *See* Ex. A; *see also* Pl.'s Mot. for TRO., Ex. 15.

Plaintiff additionally maintains that the Objections Board treated him differently than it treated the residency issue of another candidate, Michael Capps, who was running for a different office. *See* Pl.'s Mot. for TRO at 2, 8, 18. There is no basis for this argument. Plaintiff has not asserted any Equal Protection Clause argument in this lawsuit and has no standing to assert claims on behalf of third parties. In any event, the State Objections Board exhibited no differential treatment between the Plaintiff and Mr. Capps. In the case of Mr. Capps, the Board concluded that, although he was rather itinerant, he had

clearly evinced an intent to establish a residency at his new address. *See* Ex. B (State Objections Board decision on Capps matter). Plaintiff, by contrast, made no effort at his hearing to demonstrate that he was a Kansas resident. Although he faxed Mr. Caskey a one-page document purporting to be a 30-day lease agreement (for \$1/day rent) at the Liberty House approximately one hour before the hearing, *see* Pl.'s Mot. for TRO, Ex. 11, neither Plaintiff nor his attorney *ever* attempted to introduce the lease agreement into evidence. *See* Ex. C (Caskey Declaration). In fact, the lease agreement was not even discussed at the hearing. Nor did Mr. Supreme (or his attorney) ever suggest that Mr. Supreme would be establishing residency in Kansas at any point. Rather, the thrust of Mr. Supreme's argument was that no Kansas residency was required in order to run for Attorney General. In fact, when Defendant Laue specifically asked Plaintiff's attorney about the purported lease document, the attorney responded along the lines of, "We're not relying on that. That's not part of our argument." *See* Ex. D (Laue declaration).

For all these reasons, Plaintiff has come nowhere close to showing a likelihood of success on the merits of his due process claim.

6. – *First Amendment*

As for Plaintiff's First Amendment claim, he contends that his rights to free speech and freedom of association were violated when the State refused to put his name on the ballot for Attorney General. He asserts that Kan. Stat. Ann. § 25-308 is unconstitutionally vague, and that it was unconstitutionally applied to him when the objection to his candidacy was sustained by the State Objections Board. According to Plaintiff, Kansas has no residency requirement and he was thus wrongfully excluded from the ballot by

state officials who acted arbitrarily, pursuant to a vague and overly broad statute.

As a preliminary matter, because Plaintiff's First Amendment claim turns in significant part on an interpretation of the scope of statutes in a complex state election code, this case appears to be an excellent vehicle for the Court to invoke its discretionary abstention authority and defer to Kansas state courts to assess the meaning of these peculiar state law questions. Defendants' analysis in support of that argument is set forth in detail in Part III.A.7., *infra*.

To the extent the Court opts to reach the merits of Plaintiff's First Amendment claim, Plaintiff is unable to show a likelihood of success on the merits. Defendants believe that the analysis of Shawnee County District Judge Teresa Watson in the *State ex rel. Schmidt v. Kobach* opinion was spot on and that the Kansas election code provisions she reviewed in that opinion, parallel versions of which exist for Attorney General candidate eligibility requirements, would make little sense in the absence of a residency mandate for aspiring Attorney General officeholders. Moreover, given that most, if not all, other states have residency requirements for their Attorney General and other statewide elected officials, and that such requirements are routinely upheld as constitutional, *see Lindsay v. Bowen*, 750 F.3d 1061, 1063 (9th Cir. 2014) ("[R]esidency requirements . . . are neutral candidacy qualifications which the State certainly has the right to impose."); *Beil v. City of Akron*, 660 F.2d 166, 168-69 (6th Cir. 1981) (upholding one-year durational residency requirement for city council); *Joseph v. City of Birmingham*, 501 F. Supp. 1319, 1325-39 (E.D. Mich. 1981) (same), Plaintiff fails to state a claim that his First Amendment rights have been violated.

Although *State ex rel. Schmidt* dealt primarily with the issue of residency requirements for candidates for Governor and Lieutenant Governor, many of the same arguments that persuaded the Shawnee County District Court apply in equal force to candidates for Attorney General. The Court there determined that although there is no specific, standalone statute requiring candidates for statewide office to be residents of Kansas, the text of other statutes, when read *in pari materia*, provide context and offer clues regarding the legislature's intent. And they necessarily dictate that such a residency requirement exists under Kansas law. Defendants concur.

For example, Kan. Stat. Ann. § 25-613, which addresses the form of official ballots, states: "To the name of each candidate for a state office shall be added the name of the city in which the candidate resides." The fact that the ballot must include the city, but not the state, where the candidate resides strongly suggests that the Legislature intended that all candidates must reside in Kansas.

Similarly, Section 25-202(a) provides that candidates for all national, state, county, and township offices can be selected in a number of different ways, including nomination petitions. Section 25-205(b), in turn, requires the nomination petition to "be in substantially the following form," and then spells out the exact language, stating as follows:

"I, the undersigned, an elector of the county of _____, and state of Kansas, and a duly registered voter, and a member of _____ party, hereby nominate _____, who resides in the township of _____ (or at number _____ on _____ street, city of _____), in the county of _____ and state of Kansas, as a candidate for the office of (here specify the office) _____, to be voted for at the primary election to be held on the first Tuesday in August in _____, as representing the principles of such party; and I further declare that I intend to support the

candidate herein named and that I have not signed and will not sign any nomination petition for any other person, for such office at such primary election.

As Judge Watson noted when examining a similar provision, the text used by the legislature in this form “establishes a Kansas residency requirement because it contains a blank to fill in the candidates’ names and cities of residence, but specifies ‘state of Kansas’ immediately after the blank. In other words, for purposes of a nomination petition, there is no blank to fill for the candidates’ state of residence – that information is supplied by the form set out in [Section 25-205(b)], and the state specified is ‘state of Kansas.’ It assumes that the candidates seeking to use the nomination petition must be Kansas residents.” Pl.’s Mot. for TRO., Ex. 15 at 6.

Notable as well is the language of Section 25-306b(b)(1)(B), which governs the withdrawal of a candidate. It provides that a person who has been nominated may only be withdrawn from a ballot after having been nominated if (i) the nominee or an immediate family member is suffering from a severe medical hardship or (ii) the nominee certifies that he no longer resides in Kansas. This strongly suggests that residency is a requirement for all candidates.

The interplay between Sections 25-205(b) and 25-206 further reinforce the likelihood of a residency requirement. Section 25-206(a) addresses the fee requirement for candidates who file a declaration of intention to become a candidate for elected office rather than assuming their candidacy via a nomination petition. The provision provides:

Except as provided in subsection (b), when a candidate in lieu of nomination petitions files a declaration of intention to become a candidate for any national, state, county or township office, the accompanying fee shall be in an amount as follows: For the office of United States senator,

United States representative from any district or at large, all state offices, and all county offices, where the salary is over \$1,000 per year, a sum equal to 1% of one year's salary as determined by the secretary of state for state and national offices, and as determined by the county election officer for county offices. For all county offices where the salary is \$1,000 or less, a fee of \$5; for a state senator, \$75; for representatives, \$50; for all township offices, \$1. Nothing in this act shall be construed as requiring any fee of a candidate filing a declaration of intention to become a candidate for precinct committeeman or precinct committeewoman. The officer receiving the funds shall turn them over to the state treasurer, if deposited with the secretary of state, or to the county treasurer, if deposited with the county election officer, and the funds shall become a part of the general fund of the respective government.

Such declaration shall be prescribed by the secretary of state and shall be attested before a county election officer or deputy county election officer in the case of county and township offices, and before a county election officer, the secretary of state or a deputy of one of such officers in the case of state and national offices, and a notary public in the case of precinct committeemen and committeewomen.

The text of this statute is obviously silent with regard to residency. Nor does it prescribe any particular form for the joint declaration of intention. Yet, as Judge Watson noted when analyzing largely identical provisions in her opinion, Sections 25-205(b) and 25-206 would, if read literally and in isolation from each other, “set up two different sets of qualifications for candidates for the same office depending on what method was used to seek a place on the ballot.” Pl.’s Mot. for TRO., Ex. 15 at 7. In order to harmonize the two statutes and avoid an array of absurd results, Judge Watson logically concluded that the legislature must have intended to impose a residency requirement. *Id.* at 7-9.

Although Plaintiff’s motion engages in wild speculation that the absence of a specific, standalone statute governing candidate residency requirements was intentional, Pl.’s Mot. for TRO at 6-7 and n.16, there is no basis for such a conclusion. It should come as no surprise that many of the State’s founding fathers were from someplace else. The

manifest destiny spirit of the time and the great migration westward naturally led to this set of events. The notion that Kansas deliberately set out to be a state, unlike all others, in which non-residents could assume the highest levels of government, is simply preposterous. The far more likely scenario, as Judge Watson observed, is that the lack of an explicit candidate residency requirement was simply an oversight. Pl.'s Mot. for TRO., Ex. 15 at 10.

As noted above, *State ex rel. Schmidt* is the only occasion on which a Kansas court has examined whether Kansas has a residency requirement for its statewide officers. If this Court is inclined to decide Plaintiff's Complaint on the merits, rather than abstaining, then Defendants submit that the Court should adopt, or defer to, Judge Watson's interpretation. Indeed, having a federal court render an interpretation of a state statute at odds with the state's judiciary would have a deleterious effect on the essential comity that exists between those two entities, disserve important notions of federalism, and create enormous confusion in the state of the law. And if this Court accepts Judge Watson's statutory interpretation that there is a residency requirement in Kansas, Plaintiff's First Amendment argument must fail.

7. – *Prominence of Unsettled State Law Questions Underlying Plaintiff's Federal Constitutional Claims Warrants Federal Abstention*

With respect to Plaintiff's claims over which this Court *does* have jurisdiction – i.e., his requests for injunctive relief grounded in federal constitutional attacks on Kansas' election code – the prominence of unsettled issues of purely state law, and the availability of adequate state court remedies, counsel in favor of this Court's abstention under either *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), or *Burford v. Sun Oil Co.*, 319

U.S. 315 (1943). Indeed, this Court's immersion into the tangled thicket of Kansas' state residency requirements for certain political candidates risks needless interference with state policies and local sovereignty. Staying its hand is a more prudent course of action for the Court under the circumstances.

a. – *Pullman* Abstention

The so-called *Pullman* doctrine permits a federal court to abstain from adjudicating a case where “(1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law would hinder important state law policies.” *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1118-19 (10th Cir. 2008) (citation and internal alternation omitted). In explaining the predicate for this doctrine, the Supreme Court highlighted notions of federalism:

The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction . . . Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of a state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our federal system, whereby the federal courts, ‘exercising a wise discretion,’ restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary. This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.

Pullman, 312 U.S. at 501 (citations omitted). Abstention thus serves to avoid a situation in which a federal court “is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.” *Id.* at 500. All of the requisite factors for invoking this doctrine are present in the case at bar.

i. *Plaintiff’s constitutional challenges arise under areas of unsettled Kansas law*

Plaintiff’s federal constitutional claims are rooted in allegations regarding the ambiguity of various features in Kansas’ election law. He first disputes that there is a residency requirement for candidacy for Attorney General. He also takes issue with the particular grounds on which prospective candidates may be challenged as ineligible and ultimately disqualified and attacks the process by which such disputes are resolved. Each of those issues involve unsettled areas of peculiar state law.

With regard to the residency requirement question, there was, until just over a month ago, a complete paucity of any case law or administrative guidance interpreting the State’s residency requirements for non-legislative candidates. But as noted earlier, the District Court of Shawnee County, Kansas recently took up the issue in a declaratory judgment action centered around whether candidates for the offices of Governor and Lieutenant Governor must be Kansas residents. In that case, *State ex rel. Schmidt v. Kobach*, the state district court ruled on May 31, 2018, that Kansas does in fact impose a residency requirement for those offices. Although the court’s analysis was limited to the offices of Governor and Lieutenant Governor, its reasoning, as detailed above in Part III.A.6., would appear equally applicable to other statewide offices, including Attorney General. Even so, the state trial court’s decision, although correctly decided in the opinion of

Defendants, has not fully quelled the debate in many quarters over the residency requirement. For purposes of the *Pullman* doctrine consideration, therefore, the applicability of a residency requirement for state Attorney General candidates is certainly unsettled.

Plaintiff's federal constitutional challenge to the manner in which Kan. Stat. Ann. § 25-308 and, by extension, Kan. Stat. Ann. § 25-1436, are interpreted and applied should meet a similar fate. He maintains that Section 25-308(e), which incorporates Section 25-1436 and specifies the grounds upon which objections to nominations and declarations of candidacies can be asserted, is impermissibly vague and arbitrary.

Section 25-1436 governs contests of elections – the process by which a registered voter can contest the *results* of an election. Section 25-1436(a) provides that one can contest an election if the person elected “was ineligible to hold such office at the time of the election.” Plaintiff reads this provision as inapplicable to his residency issue inasmuch as “the time of the election” has not yet occurred. But another, equally plausible, reading of the interplay between Sections 25-308(e) and 25-1436(a) is that one can object to a candidate's inclusion on the ballot for the same reasons that a voter could later object to that candidate's election pursuant to Section 25-1435. In other words, one could read Section 25-308's incorporation of Section 25-1436 as providing that if one can object to a candidate for not being a resident when he is elected under Section 25-1435, then one can also object to that candidate's listing on the ballot under Section 25-308(e).

The real point here, though, is that the law on this issue is unsettled. Indeed, there is a complete paucity of case law addressing this timing question. Other than the written

decision of the State Objections Board rejecting Plaintiff's candidacy, *see* Exhibit A, administrative guidance is also totally lacking.

- ii. *State court interpretation of the state issues would obviate the need to consider the federal constitutional issues*

A definitive interpretation of the unsettled areas of state election law described above would negate the need for this Court to entertain Plaintiff's First and Fourteenth Amendment claims. If Kansas courts determine, for example, that a candidate for Attorney General must be a resident of the State, then the State was entirely justified in removing Plaintiff from the ballot. Courts have routinely sanctioned residency requirements for candidates for state and municipal offices. *See, e.g., Lindsay*, 750 F.3d at 1063 ("[R]esidency requirements . . . are neutral candidacy qualifications which the State certainly has the right to impose."); *Beil*, 660 F.2d at 168-69 (upholding one-year durational residency requirement for city council); *Joseph*, 501 F. Supp. at 1325-39 (same). Similarly, if Kansas courts embrace Defendants' interpretation articulated above as to the interplay between, and timing of candidate eligibility objections under, Kan. Stat. Ann. §§ 25-308 and 25-1436, then Plaintiff's constitutional causes of actions dissolve.

Naturally, this Court's constitutional inquiry would be different if our state courts were to come to the opposite legal conclusion on these matters. But in any event, Defendants respectfully suggest that this Court keep in mind the *Pullman* Court's caution when it recommended care in circumstances such as this, lest the Court reach "a tentative answer which may be displaced tomorrow by a state adjudication." *Pullman*, 312 U.S. at 500.

iii. *An incorrect decision by this Court would hinder important state law policies*

The Tenth Circuit counsels district courts that, in determining whether to abstain under the *Pullman* doctrine, they should also focus on whether a decision would hinder important state law policies. Stout, 519 F.3d at 1119. Such policies are clearly implicated here. The Supreme Court itself has underscored that, in order to have fair, honest, and orderly elections, “substantial regulation of elections” is necessary, and such regulatory interests are compelling for the state. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Candidate residency requirements, in particular, have been held to promote legitimate state interests. *See, e.g., City of Birmingham*, 510 F. Supp. At 1337-38 (residency requirements help ensure that voters know the character of candidates, protect the integrity of the political process from frivolous or fraudulent candidates, safeguard citizens from “raiders” who are not seriously committed to the interests of the community, and ensure knowledgeable candidates); *Hankins v. Hawaii*, 639 F. Supp. 1552, 1556 (D. Haw. 1986) (“The State has a strong interest in the assurance that its governor will be a person who understands the conditions of life in Hawaii.”); *Walker v. Yucht*, 352 F. Supp. 85, 98 (D. Del. 1972) (same)

Both the First and Fifth Circuits have invoked *Pullman* abstention in cases very similar to this one. In *Barr v. Galvin*, 626 F.3d 99 (1st Cir. 2010), the national and state Libertarian Parties challenged a Massachusetts statute that governed the substitution of non-party candidates for President and Vice-President on the ballot. The plaintiffs argued that the statutory framework for substitution was vague because it “allowed the Secretary [of State] to exert unconstitutional, unfettered discretion to allow or prohibit

substitution during any given election.” *Id.* at 106. The First Circuit noted that because the statute in question had never been considered by any state court, the federal case involved an uncertain issue of state law that turned on a choice between one of several alternative interpretations of the statute. *Id.* at 108. The Court acknowledged that the statute was arguably vague, but decided to abstain under *Pullman*. *Id.* at 108. In invoking *Pullman*, the Court observed:

The mere fact that a statute requires interpretation does not necessarily render it void for vagueness. Once the state courts clarify section 14's relevance (if any) to substitution of presidential and vice-presidential candidates, such a clarification, however it comes out, would end the “void for vagueness” argument. Thus, both of the preconditions for *Pullman* abstention are satisfied in this case.

Id.

In *Moore v. Hosemann*, 591 F.3d 741 (5th Cir. 2009), the Fifth Circuit considered a challenge to Mississippi election law. The relevant statute mandated that all candidates for public office submit their qualifying papers to the Secretary of State on or before September 5. *Id.* at 742. A candidate for the Socialist and Natural Law parties attempted to drop off his papers shortly after 5:00 p.m. on September 5. *Id.* at 743. The Secretary of State asserted that his office closed at 5:00 p.m., and, therefore, the candidate’s attempt to get on the ballot was untimely. *Id.* The Secretary relied on another statute that dictated that his office shall close at 5:00 p.m. *Id.* The candidate sued in federal court, arguing that his constitutional rights had been violated and seeking injunctive relief. On appeal, the Fifth Circuit observed that “the existence of a constitutional question is entirely contingent on an unresolved interpretation of Mississippi law.” *Id.* at 745. That is to say, no state court had ever considered how the September 5 deadline to submit papers to the

Secretary was to be read in conjunction with the other Mississippi statute providing that the Secretary's office shall close at 5:00 p.m. *Id.* at 746. Confronted with this scenario, the Court held that *Pullman* abstention was appropriate. *Id.* at 745-46. In so doing, the Court noted:

The question of state law here is at least—and perhaps even more than—“fairly subject” to the Secretary's understanding. We abstain from deciding this question of state law prematurely, however, because an authoritative answer from the Mississippi courts in the Secretary's favor would also dispose of any federal constitutional question. We therefore remand the constitutional claim to the district court and urge it, likewise, to consider whether to abstain.

Id. at 745-46.

Barr and *Moore* are instructive here. Both courts exercised restraint and abstained from stepping into a constitutional morass that would ultimately turn on unsettled interpretations of purely state election law. Their abstention helped preserve and enhance comity between the federal judiciary and its state court counterpart. The same principles are at play here. This Court should abstain from rendering any rulings on Plaintiff's constitutional claims until such time as the Kansas state courts have had further opportunity to weigh in and issue definitive rulings.

b. *Burford* Abstention

This is also a case in which *Burford* abstention is appropriate. The *Burford* abstention doctrine provides that, where timely and adequate state-court review is available, a federal court sitting in equity may decline to interfere with the proceedings or orders of state administrative agencies if the federal suit: (1) would present difficult questions of state law bearing on policy problems of substantial public import whose

importance transcends the result in the case then at bar; *or* (2) would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-27 (1996) (citing *Burford*, 491 U.S. at 361). Although the Supreme Court has suggested that this doctrine is generally reserved for extraordinary circumstances, *id.* at 726, it has also highlighted *Burford*'s importance in preserving principles of federalism and comity, *Grove v. Emison*, 507 U.S. 25, 32 (1993), and in allowing states to retain local control over difficult questions of state law bearing on policy problems of substantial import. *Quackenbush*, 517 U.S. 728 (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

In the instant action, Kansas law unequivocally endowed Plaintiff with an opportunity to contest in state court the rejection of his candidacy for Attorney General. The legislative scheme addressing objections to candidates' eligibility includes an express provision allowing for rejected candidates to file a mandamus action in state court to compel the placement of their name on the ballot. *See* Kan. Stat. Ann. § 25-308(f) ("All mandamus proceedings to compel an officer to certify and place upon the ballot any name or names . . . must be commenced not less than 45 days before the election." For whatever reason, Plaintiff affirmatively chose not to avail himself of this right. Instead, he chose to file this action in federal court. Given these facts, both prongs of *Burford*—only one of which is required—weigh in favor of abstention.

The state law issues at play here are tricky questions that bear on policy problems whose importance goes beyond the result in this particular case. Kansas has compelling interests in both ensuring that its candidates for statewide office are residents of the State

and in organizing a comprehensible and manageable ballot. More broadly, Kansas has a compelling interest in administering and regulating its own elections. The reticulated statutory structure governing Kansas' elections requires interpretation from the state courts, and Kansas's interest in resolving these issues cannot be overstated. If Plaintiff wanted to raise those issues, he should have sought review of the objection to his candidacy by filing a mandamus action, as prescribed in Section 25-308(f). The State's interest in interpreting and administering its own election laws transcends Plaintiff's desire to prove some sort of point with a satirical campaign for Attorney General.

By seeking a remedy in federal court after his deadline to file a mandamus action has passed, Plaintiff is attempting to use this Court to disrupt Kansas's election process. Section 25-308(f) allows a candidate to seek review of an adverse objection decision by way of a mandamus action, but such action must be filed no less than 45 days before the election in question. At the time the State Objections Board rejected Plaintiff's candidacy on June 11, 2018, Plaintiff still had time to file such an action. But he sat on his right, forewent the state court option, and opted to file this federal action instead.

Section 25-308(f)'s time deadline serves a critical objective – there must be a “cut off” period of ballot access for an election to proceed in an orderly manner. *See American Party of Tex v. White*, 415 U.S. 767, 787 n.18 (1974) (“[S]ome cut off period is necessary for the Secretary of State to verify the validity of signatures on the petitions, to print the ballots, and if necessary, to litigate any challenges.”). Plaintiff presumably had his own personal reasons for waiting weeks after his candidacy had been rejected to pursue judicial relief, and then disregarding the prescribed state court remedy. But this Court

should not allow him to flaunt the deadlines set forth in Kansas' election laws and circumvent the rules applicable to all other candidates by bringing this federal suit. In short, the exercise of federal review here would disrupt Kansas's effort to administer its elections in a timely and orderly manner.

Particularly relevant here is the Tenth Circuit's decision in *Robert-Gay Energy Enterprises, Inc. v. State Corporation Commission*, 753 F.2d 857 (10th Cir. 1985). In that case, the plaintiff sought an allowable bonus on an oil well from the Kansas Corporation Commission (KCC). After the KCC denied the plaintiff's application, the plaintiff sued in federal court, seeking injunctive relief and alleging that the KCC's decision constituted a taking of property without just compensation in violation of the Fourteenth Amendment. *Id.* at 858-59. On appeal, the Tenth Circuit held that *Burford* abstention was proper because of a state law directing that "any action for judicial review of any . . . decision of the [KCC] may be brought against the [KCC] in the district court of any county in the state wherein the property affected thereby is located." *Id.* at 860. "If adequate state court review of an administrative order based upon predominantly local factors is available," the Tenth Circuit reasoned, then "intervention of a federal court is not necessary for the protection of federal rights." *Id.* (citing *Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 349 (1951)). Given that the same principles are applicable to the case at bar, Defendant respectfully suggests that this Court abstain from taking up Plaintiff's constitutional causes of action.

B. – Plaintiff’s threatened injury does not outweigh the injury to Defendants and the public

Even if the Court determines that one or more of Plaintiff’s causes of action not only survive the jurisdictional defenses and procedural roadblocks set forth above, but also show a likelihood of success on the merits, a preliminary injunction would still be wholly inappropriate here due to the imminence of the August 7 primary election and the adverse impact such relief would have on the State’s ability to comply with other federal election laws.

The Supreme Court has consistently directed lower courts to exercise significant caution and restraint before ordering any changes to a state’s election procedures on the eve of an election. The Court has observed that such “orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As the election draws closer, that risk will increase.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). Requests for injunctive relief that would change election law in close proximity to an election are met with extreme skepticism and nearly always rejected. *See Veasey v. Perry*, 769 F.3d 890, 894-95 (5th Cir. 2014) (cataloguing Supreme Court cases).

In fact, in *Williams v. Rhodes*, 393 U.S. 23 (1968), even after concluding that a candidate had been unconstitutionally excluded from the ballot, the Supreme Court specifically refused to order the addition of that candidate’s name to the ballot in light of the immanency of the election and the resulting burdens such an addition would have on the electoral process. *Id.* at 34-35. The candidate’s party filed its request for relief 53

days prior to the election. *Williams*, 393 U.S. at 64 n.2 (Warren, J., dissenting).⁴ Recognizing the impact any judicial relief would have on the state's administration of the election at that point, however, the Court denied all relief. The Court noted that, "at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters." *Id.* at 35.

The Seventh Circuit reached a similar result in *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004). There, the Court held that a third-party candidate's demand for placement on the ballot in Illinois, which had been denied to him based on what he alleged were unconstitutional state election code signatory requirements, had been filed too late to warrant judicial relief. *Id.* at 736-37. After the district court denied the request for injunctive relief, the candidate promptly appealed and filed his opening brief in the court of appeals 56 days before the general election and expedited briefing was ordered.⁵ Even that, though, was not enough. Upon issuing its decision on September 20, 2004 – 43 days before the election – the Seventh Circuit reasoned that "any remedial order would throw the state's preparations for the election into turmoil. Absentee ballots have already been mailed to voters who will be overseas on election day . . . and the remaining absentee ballots will be mailed [within days]." *Id.* at 736. The Court noted that issuance of a last-minute injunction would thus harm countless numbers of voters. *Id.*

⁴ The request for injunctive relief was filed on September 13, 1968, which was 53 days before the November 5, 1968 general election.

⁵ The candidate's opening brief was filed on September 7, 2004. *See* 2004 WL 5706135. The general election was November 2, 2004.

The same is true in the case at bar. The federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) mandates that states transmit requested absentee ballots to both absent uniformed service members and overseas citizens no later than 45 days before the election. *See* 52 U.S.C. § 20302(a)(8)(A); *see also* Kan. Stat. Ann. § 25-1220 (state counterpart). For the upcoming primary election on August 7, 2018, that deadline was June 23, 2018. Accordingly, hundreds of absentee ballots have already been sent out by the various Kansas counties where such voters are registered. Any modification to the ballot at this stage would thus trigger a violation of UOCAVA and render compliance with the statute almost impossible. It also would be expensive and create havoc in administering the election. After all, UOCAVA voters are returning completed ballots each day, and it would be difficult – if not impossible – to segregate the new ballots from the old ones. Many voters likely would be disenfranchised in the process.

The issue presents similar problem for non-UOCAVA ballots. State law requires that advance/absentee ballots be “transmitted to the advance voting voter not more than 20 days before the election but within two business days of the receipt of such voter’s application by the election officer or the commencement of such 20-day period.” Kan. Stat. Ann. § 25-1123(a).⁶ But nearly every county in the State has already sent their draft ballots off to the printer. (As each county is responsible for printing its own ballots, a variety of different private printing companies are used by those counties that do not handle the printing on their own). Any changes at all to the primary ballot this late in the

⁶ Non-UOCAVA advance ballots can be sent out even before the 20-day limit in the case of voters who are suffering from a temporary illness or disability or who are not proficient in the English language. *See* Kan. Stat. Ann. § 25-1123(b).

election calendar would not only cause most counties to incur significant expense, but the counties' ability to meet the 20-day mailing period – thereby ensuring voters with travel plans are able to vote – likely will be compromised. Moreover, because Kansas requires ballot rotation, *see* Kan. Stat. Ann. § 25-610, any judicially-mandated alterations to the ballot would require every county in the State to re-print every Republican ballot and re-program every voting tabulation device to accurately tabulate due to the ruling. This would cost tens of thousands of dollars across the State and may impact the ability of counties to stay within their election budget for this year. *See* Ex. C.

IV. – Conclusion

For the foregoing reasons, Defendants respectfully request that the Court deny the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction.

Respectfully Submitted,

By: /s/ Bradley J. Schlozman
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on July 2, 2018, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notifications of such filing to the e-mail addresses on the electronic mail notice list, including counsel for the Plaintiff.

By: /s/ Bradley J. Schlozman

KANSAS STATE OBJECTIONS BOARD

IN THE MATTER OF THE OBJECTION)
FILED BY JIM JOICE, EXECUTIVE)
DIRECTOR OF KANSAS REPUBLICAN)
PARTY CONCERNING THE)
CANDIDACY OF VERMIN SUPREME)
FOR STATE ATTORNEY GENERAL)

ORDER OF THE BOARD

On June 11, 2018, the Kansas State Objections Board (hereinafter the “Board”), consisting of Deputy Attorney General Athena Andaya, representing Attorney General Derek Schmidt; Chief Counsel to Governor Colyer, Brant Laue, representing Lieutenant Governor Tracey Mann; and Secretary of State Kris Kobach, met pursuant to K.S.A. 2017 Supp. 25-308, to consider the objection filed by Jim Joice concerning the candidacy of Vermin Supreme for State Attorney General. Mr. Joice appeared in person and was not represented by counsel. Mr. Supreme appeared telephonically. Mr. Supreme was represented by Marc Randazza, an attorney appearing telephonically from Las Vegas, Nevada, and by local counsel for Mr. Supreme, Rep. Dennis Highberger, who appeared in person.

BACKGROUND

On June 1, 2018, Mr. Supreme appeared in person at the Kansas Secretary of State’s office and completed a Candidate’s Declaration of Intention to seek the Republican nomination for the office of Kansas Attorney General. Mr. Supreme paid the \$1660.00 filing fee in cash. Mr. Supreme listed his city of residence as “Rockport, MA/Topeka.” Mr. Supreme listed his contact information as “2 Edmonds Ln Rockport, MA 019-6/3722 SW 12 St Topeka.”

On June 1, 2018, Mr. Joice lodged a formal objection to the candidacy of Mr. Supreme in the form of a letter delivered to the Kansas Secretary of State's Office. The objection to Mr. Supreme was "based off of residency" because Mr. Supreme does not live in Kansas.

At the hearing, Mr. Supreme's counsel presented oral argument in support of his position that there is no Kansas law in effect that prohibits Mr. Supreme from seeking this nomination. Although Mr. Randazza acknowledged that the Kansas legislature recently passed a new law expressly stating that a candidate for Attorney General must be a resident of Kansas, he argued that, because the new law does not go into effect until January 1, 2019, Mr. Supreme is eligible to seek the nomination.

Secretary Kobach asked Mr. Randazza to address the issuance of a Declaratory Judgment by Judge Teresa Watson of the District Court for Shawnee County, Kansas on May 31, 2018, which concluded that existing Kansas law requires that a candidate for Governor must be a resident of Kansas. Mr. Randazza replied that Judge Watson's order only addressed candidacy requirements of someone seeking a nomination to run for Kansas Governor. Both Secretary Kobach and Mr. Laue stated that they disagreed with Mr. Randazza's summary of Judge Watson's order and stated that the order was applicable to all state office positions.

Mr. Joice did not present argument.

ACTION OF THE BOARD

After hearing the arguments of Mr. Supreme's counsel, and considering all evidence and arguments before the Board, Mr. Laue moved that the Board grant Mr. Joice's objection. The motion was seconded by Secretary Kobach and passed by a majority vote of the Board. Deputy Attorney General Athena Andaya abstained from discussion and voting in this matter.

ANALYSIS

A recent court order issued in the District Court of Shawnee County, Kansas, is directly applicable to the objection raised regarding Mr. Supreme's candidacy. The court's May 31, 2018, order first looked to "statutes that apply to statewide offices in general."¹ The court then cited K.S.A. 25-4001: "The governor, lieutenant governor, secretary of state, attorney general, state treasurer and commissioner of insurance shall be elected for terms of four (4) years, to begin on the second Monday of January next after their election, and until their successors are elected and qualified."² Next it referenced K.S.A. 25-4002, which states: "Except as otherwise provided in this act, election laws applicable to other state officers elected from the state as a whole shall apply to the nomination and election of the governor, lieutenant governor, secretary of state and attorney general."³ In addition to the above statutes that the court cited as "persuasive," the court noted that K.S.A. 2017 Supp. 25-306b "suggests that the loss of Kansas residency is a disqualifying factor triggering the extraordinary measure of allowing a candidate to withdraw after winning the primary." The court's initial reference to these statutes created foundational support for its holding on the specific offices raised before it which were those of Governor and Lt. Governor. There is no evidence to suggest that the court's ruling does not apply to the other state office nominations including for the office of Attorney General.

Residency of a voter is determined by the "place adopted by a person as such person's place of habitation, and to which, whenever such person is absent, such person has the intention of returning." K.S.A. 25-407. Thus, residency has two requirements: the person must adopt the place as his or her place of habitation and, when absent, the person must have an intention of returning to that place.

¹ *State of Kansas ex rel. Attorney General Schmidt v. Secretary of State Kobach, Respondent and Andy Maskin, Intervenor*, Case. No. 2018-CV-285 (Dist. Court for Shawnee Co., Kan., Order 5/31/18).

² *Id.*

³ *Id.*

During the hearing, there was no evidence offered that Mr. Supreme considers his residence to be in Kansas. Rather, Mr. Supreme's counsel argued that despite being a nonresident, Mr. Supreme was eligible to seek the nomination.⁴

ORDER

For the foregoing reasons, the Board finds that the objection is hereby granted.

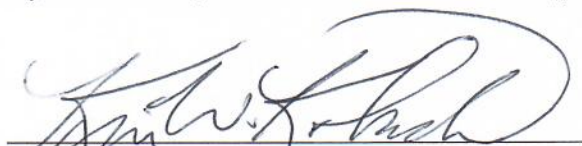
IT IS SO ORDERED THIS 27th DAY OF June, 2018.



Attorney General Derek Schmidt
By Athena Andaya, Deputy Attorney General



Lieutenant Governor Tracey Mann
By Brant Laue, Chief Counsel to Gov. Colyer



Secretary of State Kris Kobach

⁴ Notably, although Mr. Supreme faxed in a one page document appearing to relate to the rental of a room for 30 days, the document was not admitted into evidence nor discussed.

KANSAS STATE OBJECTIONS BOARD

IN THE MATTER OF THE OBJECTION)
 FILED BY MONICA M. MARKS)
 CONCERNING THE CANDIDACY OF)
 MICHAEL R. CAPPS FOR REPRESENTATIVE)
 FOR THE 85TH DISTRICT)

ORDER OF THE BOARD

On June 11, 2018, the Kansas State Objections Board (hereinafter the “Board”), consisting of Deputy Attorney General Athena Andaya, representing Attorney General Derek Schmidt; Chief Counsel to Governor Colyer, Brant Laue, representing Lieutenant Governor Tracey Mann; and Secretary of State Kris Kobach, met pursuant to K.S.A. 2017 Supp. 25-308, to consider the objection filed by Monica M. Marks concerning the candidacy of Michael R. Capps for State Representative for the 85th District. Ms. Marks appeared through her counsel, Mr. Victor W. Miller, a Topeka attorney. Mr. Capps appeared in person and represented himself.

BACKGROUND

On June 1, 2018, Mr. Capps had a representative file, on his behalf, a Candidate’s Declaration of Intention to seek the Republican nomination for the Kansas House of Representatives representing the 85th District. Mr. Capps listed the address of 3103 N. Gouverneur, Wichita, Kansas as his residence. The Gouverneur address is located within the 85th District. On June 4, 2018, Ms. Marks, a Democrat candidate for the 85th District, lodged a formal objection through her attorney who delivered a letter to the Kansas Secretary of State’s Office. The objection asserts that Mr. Capps does not live in the 85th District; rather, Ms. Marks alleges that Mr. Capps resides in the 97th District at 2832 S. Chase Avenue, Wichita, Kansas. The objection further states that on May 5, 2018, Mr. Capps filed a Declaration of Intention to run for office in the 97th District.

At the hearing, Mr. Miller presented evidence indicating the following:

- On 4/10/15, Mr. Capps registered to vote using the Gouverneur address.
- On 2/04/16, Mr. Capps exempted from bankruptcy his home at the Gouverneur address.
- On 2/22/16, Mr. Capps registered to vote using an address on Nevada Street.
- On 3/02/16, Mr. Capps filed a Declaration of Intention to run for House Rep in the 95th District using an address on Sheridan Street.
- On 2/20/17, Mr. Capps registered to vote using an address on St. Clair, claiming residency there since 12/28/16.
- On 11/30/17, Mr. Capps registered to vote using an address on Chase Street.
- On 3/13/18, Mr. Capps filed a Declaration of Intention to run for House Rep in the 97th District.
- On 5/29/18, Mr. Capps withdrew his name from the 97th District House race.
- On 5/29/18, Mr. Capps registered to vote using an address on Gouverneur.
- On 6/01/18, Mr. Capps filed a Declaration of Intention to run for House Rep in the 85th District.

In addition to the above, Mr. Miller presented an affidavit from Ms. Marks stating that she lives at 3203 N. Gouverneur. Mr. Miller also submitted evidence that the house at 3103 N. Gouverneur is in foreclosure with a sale ordered to take place on June 27, 2018 at 10:00am.

In response to all of the evidence presented by Mr. Miller, Mr. Capps offered the following:

- Photographs of the inside of a house located at 3103 N. Gouverneur.
- The Deed on the Gouverneur house which is dated 2005 and is in his name
- A letter to Mr. Capps from Millsap & Singer stating the amount due to redeem the foreclosed home on Gouverneur is \$32, 972.77 as of June 7, 2018.
- A cashier's check drawn on Cross First Bank dated June 8, 2018, in the amount of \$32,972.77 made payable to Loan Care LLC with Michael R. Capps listed as the remitter.

- Six unsworn statements from friends and neighbors asserting that Mr. Capps resides at 3103 N. Gouverneur.
- Utility bills for the address on Gouverneur in the name of Mr. Capps dated from February 2018 to the present.

In sum, Mr. Miller presented evidence that Mr. Capps has asserted residency simultaneously at more than one address. He also presented evidence that the Gouverneur house has been in foreclosure since January, 31, 2018 and is scheduled to be sold on June 27, 2018. In response, Mr. Capps offered evidence that he still owns the home and resides at 3103 N. Gouverneur in Wichita, Kansas, which is within the 85th District. Mr. Capps stated that he rents the home on Chase Avenue (in District 97) for his college-aged son and his son's friends to live in. Mr. Capps claims that his primary residence is on Gouverneur and that he intends for the Gouverneur address to be his permanent place of residence.

ACTION OF THE BOARD

After hearing the arguments of Mr. Miller and the response of Mr. Capps, and considering all evidence and arguments before the Board, Mr. Laue moved that the board deny Ms. Marks' objection. The motion was seconded by Secretary Kobach and passed by the unanimous vote of the Board.

ANALYSIS

The Kansas Constitution sets forth the following qualifications for candidates for nomination or election to the Kansas legislature:

“During the time that any person is a candidate for nomination or election to the legislature and during the term of each legislator, such candidate or legislator shall be and remain a qualified elector who resides in his or her district.”

Kan. Const. Art. 2, § 4. To be a “qualified elector,” one must be a “citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she

seeks to vote.” Kan. Const. Art. 5, § 1. In Kansas, a “qualified elector” has also been defined as a registered voter.¹

Residency of a voter is determined by the “place adopted by a person as such person’s place of habitation, and to which, whenever such person is absent, such person has the intention of returning.” K.S.A. § 25-407. Thus, residency has two requirements: the person must adopt the place as his or her place of habitation and, when absent, the person must have an intention of returning to that place.

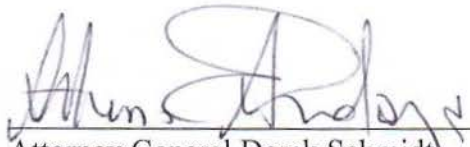
During the hearing, the Board cited to its previous rulings regarding residency, specifically to its June 19, 2014 ruling on the objection filed to John Whitmer’s candidacy for Representative of the 93rd District, and to its July 2, 2012 ruling on the objection filed to Janice Pauls’ candidacy for Representative of the 102nd District. Both objections were based on assertions that the candidates did not reside within the district. However, the Board was bound to follow state law defining residency as the place where a person adopts as his or her home and has the intention of returning when away. Secretary Kobach pointed out that residency can attach in as little time as one day, such as when a person moves to a new address. Although the evidence suggests that Mr. Capps has frequently changed his residence in order to run for office, the testimony of Mr. Capps that he has adopted 3103 N. Gouverneur, Wichita, Kansas, as his place of habitation and intends to live there, makes him a qualified elector of, and a qualified candidate for nomination for the 85th Kansas House District.

ORDER

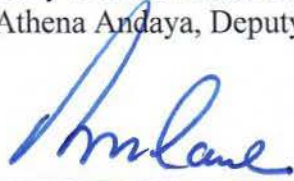
For the foregoing reasons, the Board finds that the objection is hereby denied.

¹ *Coney v. City of Topeka*, 96 Kan. 46 (1915), *Blake v. Dunn*, 235 P. 132 (Kan. 1925), *Wycoff v. Board of County Comm’rs.*, 191 Kan. 658 (1963), Atty. Gen. Op. 1982-18 (citing *Coney v. City of Topeka*), 1978 Op. Kan. Att’y Gen. 307, 1980 Op. Kan. Att’y Gen. 266.

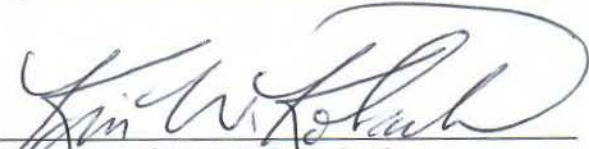
IT IS SO ORDERED THIS 27th DAY OF June, 2018.



Attorney General Derek Schmidt
By Athena Andaya, Deputy Attorney General



Lieutenant Governor Tracey Mann
By Brant Laue, Chief Counsel to Gov. Colyer



Secretary of State Kris Kobach

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

VERMIN SUPREME,

Plaintiff,

v.

KANSAS STATE ELECTIONS BOARD;
KRIS KOBACH, in his official and
individual capacity JEFF COLYER, in his
official and individual capacity, BRANT
LAUE, in his official and individual capacity,
DEREK SCHMIDT, in his official and
individual capacity, and BRYAN CASKEY,
in his official capacity,

Defendants.

Case No. 6:18-cv-01182-EFM-JPO

DECLARATION OF BRYAN CASKEY

I, Bryan Caskey, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the foregoing is true and correct:

1. I am a United States citizen, Kansas resident, and eligible voter.
2. My title is Assistant Secretary of State, Elections and Legislative Matters for the State of Kansas. As such, I am the Elections Director for the State of Kansas. I have held that position since February 2015. I have worked in the Kansas elections office since March 1998.
3. My responsibility is to oversee the administration of elections in Kansas. As part of my numerous duties in this regard, I administer the State's Election Voter Information System

(“ELVIS”) database and I work directly with the counties throughout the State in managing the registration of voters. I also issue instructions to county election officers and county clerks on how elections should be conducted. In addition, all candidates for national and state office must file with the Elections Division of the Secretary of State’s office. I oversee this process.

4. On Thursday, May 31, 2018, the Shawnee County District Court issued an opinion in *State ex rel Schmidt v. Kobach*, Case No. 2018-CV-285, issued an opinion holding that there is a Kansas residency requirement for candidates for governor and lieutenant governor.

Vermin Supreme’s Filing for Attorney General Candidate

5. The next morning, Friday June 1, 2018, Mr. Vermin Supreme filed a declaration of intent to become a candidate for Attorney General. I, personally accepted and processed Mr. Supreme’s filing as a candidate for Attorney General. At the time I accepted Mr. Supreme’s declaration, I was unaware of the specifics of the Shawnee County District Court ruling. I learned about it later that afternoon.

6. In connection with my role as the filing official in the Secretary of State’s Office, I generally accept all filings, particularly at the last minute of the filing deadline, even if I think the papers are deficient or the applicant may be ineligible. Under K.S.A. 25-208a, the Secretary of State’s office has 10 days to determine the validity of a declaration of intention.

7. At 6:23 p.m. on Friday, June 1, 2018, an objection was filed concerning Mr. Supreme’s candidacy (based on his non-residency status) by Jim Joice.

8. Any time a formal objection is filed concerning a candidate's eligibility, the objection is referred to the State Objections Board for a hearing and resolution as set forth in K.S.A. 25-308.

9. The Objections Board met to consider Mr. Supreme's candidacy on Monday, June 11, 2018. I attended the hearing in person.

10. An hour or so before the hearing, Mr. Supreme faxed me a one-page document appearing to relate to the rental of a room for 30 days.

11. To the best of my knowledge, neither Mr. Supreme nor his attorney ever attempted to introduce the lease agreement into evidence during the hearing. Nor did Mr. Supreme (or his attorney) ever suggest that Mr. Supreme would be establishing residency in Kansas at any point. Rather, the thrust of Mr. Supreme's argument was that no Kansas residency was required in order to run for Attorney General.

Printing and Mailing of Ballots (Including UOCAVA and Advance Ballots)

12. County election officials are solely responsible for the printing of official election ballots for the 2018 Primary Election (scheduled for Tuesday, August 7, 2018). Counties are also solely responsible for the programming of voting equipment that will be used to tabulate votes cast in the 2018 Primary Election.

13. State and federal law require counties to transmit ballots to UOCAVA (Uniformed and Overseas Citizens Absentee Voting Act) voters no later than 45 days prior to any election. This year, at least 265 ballots were transmitted by county election officers no later than Saturday,

June 23, 2018. Based on my experience in prior elections and in talking with current election officials, dozens of these ballots have already been voted and returned by the voter. And more are coming in by the day.

14. Counties are currently working with private vendors on printing their ballots and programming their voting equipment. Many counties have already incurred expenses. Because of advance voting requirements (both in person and mailing, the latter of which allows ballots to be sent out 20 days before the August 7 primary election), counties must have all ballots proofread and printed, and all machines programmed, no later than Wednesday, July 18, 2018.

15. Nearly every county in the State has already sent their draft ballots off to the printer. (Each county is responsible for printing its own ballots, and a variety of different private printing companies are used by those counties that do not handle the printing in house). Any changes at all to the primary ballot this late in the election calendar would not only cause most counties to incur significant expense, but the counties' ability to meet the 20-day mailing period for advance ballots would be compromised, potentially disenfranchising voters who are counting on receiving those ballots early due to travel plans and the like.

16. If a temporary restraining order was issued, irreparable harm could take place in the election process. Due to the issuance of UOCAVA ballots to members of the military, the Department of Justice would likely be interested in ensuring that UOCAVA voters receive the full 45 days to receive and transmit the correct ballot. In Kansas and other jurisdictions, DOJ has ordered ballots to be received after Election Day and counted to ensure compliance with the 45

day law. If this occurs, counties will be out of compliance with Kansas law regarding the certification of results and it will inevitably delay the timing of county and state certification of the results. This could also have an impact on the ability to certify candidates for the 2018 General Election and potentially delay UOCAVA ballots being transmitted for the 2018 General Election by the September 22, 2018, deadline.

17. Kansas also requires ballot rotation. If a temporary restraining order or preliminary injunction was issued, each county would have to re-print every Republican ballot and re-program every voting tabulation device to accurately tabulate results for this ruling. This would cost tens of thousands of dollars across the state and may impact the abilities of counties to stay within their election budget for this year.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 2, 2018


Bryan Caskey

State of Kansas
County of Shawnee

Signed or attested before me on 7-2-18
by Bryan Caskey

5



Susan L. Waddle

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

VERMIN SUPREME,

Plaintiff,

v.

KANSAS STATE ELECTIONS BOARD;
KRIS KOBACH, in his official and
individual capacity JEFF COLYER, in his
official and individual capacity, BRANT
LAUE, in his official and individual capacity,
DEREK SCHMIDT, in his official and
individual capacity, and BRYAN CASKEY,
in his official capacity,

Defendants.

Case No. 6:18-cv-01182-EFM-JPO

DECLARATION OF BRANT LAUE

I, Brant Laue, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the foregoing is true and correct:

1. I am a United States citizen, Kansas resident, and eligible voter.
2. My title is Chief Counsel in the Office of the Governor. I have held that position since November 2013. The Office of the Governor includes both the Governor and the Lieutenant Governor.

3. Among my many responsibilities is that I often serve as the Lieutenant Governor's representative on the State Objections Board when election-related disputes come before the Board. The Board consists of the Lieutenant Governor, Attorney General, and Secretary of State.

Vermin Supreme's Filing for Attorney General Candidate

4. On Thursday, May 31, 2018, the Shawnee County District Court issued an opinion in *State ex rel Schmidt v. Kobach*, Case No. 2018-CV-285, holding that there is a Kansas residency requirement for candidates for governor and lieutenant governor.

5. The next morning, Friday, June 1, 2018, Mr. Vermin Supreme filed a declaration of intent to become a candidate for Attorney General.

6. Late in the day on Friday, June 1, 2018, an objection was filed concerning Mr. Supreme's candidacy (based on his non-residency status) by Jim Joice, the Executive Director of the Republican Party.

7. The Objections Board met to consider Mr. Supreme's candidacy on Monday, June 11, 2018. I attended and participated as the Lieutenant Governor's representative.

8. Mr. Supreme or someone on his behalf apparently faxed a one-page document to the Board in advance of the hearing, which purported to be the signature page of a short-term lease agreement for \$1 per day.

9. Neither Mr. Supreme nor his attorney ever attempted to offer the lease agreement into evidence during the hearing. Nor did Mr. Supreme (or his attorney) ever suggest that Mr.

Supreme had established residency in Kansas at any point. Rather, the thrust of Mr. Supreme's argument was that no Kansas residency was required to run for Attorney General.

10. Near the end of the hearing, I asked several questions about Mr. Supreme's place of residence and Mr. Supreme's lease agreement. I noted that his declaration had listed his primary place of residence as Rockport, Massachusetts, but that he had also listed an address in Topeka, Kansas. I specifically asked his counsel whether they wanted to explain the relevance of the lease agreement. His attorney responded along the lines of, "We're not relying on that. That's not part of our argument." In the totality of the circumstances, I viewed this as an indication that Mr. Supreme did not consider himself a Kansas resident and did not intend to establish a Kansas residency.

I declare under penalty of perjury that the forgoing is true and correct.

Executed on July 2, 2018



Brant Laue