No. 125084-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEAGUE OF WOMEN VOTERS OF KANSAS; LOUD LIGHT; KANSAS APPLESEED CENTER FOR LAW AND JUSTICE; TOPEKA INDEPENDENT LIVING RESOURCE CENTER; CHARLEY CRABTREE; FAYE HUELSMANN; and PATRICIA LEWTER

Plaintiffs-Appellants

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State; and KRIS KOBACH, in his official capacity as Kansas Attorney General

Defendants-Appellees

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DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION TO TAKE JUDICIAL NOTICE OF PUBLIC STATEMENTS BY SECREATRY OF STATE SCOTT SCHWAB

Defendants-Appellees file this response to the Plaintiffs-Appellants' motion to take judicial notice pursuant to K.S.A. 60-409(b)(4) of certain public statements by Secretary of State Scott Schwab (the "Secretary"). The motion is procedurally improper and should be denied.

A. None of the Referenced Statements Are "Facts" Susceptible to Judicial Notice.

Plaintiffs reference three comments by the Secretary at a recent Senate Federal and State Affairs Committee hearing on S.B. 208, a bill that would restrict the availability of so-called "drop boxes" to return advance ballots. Mot. at 2. None of these comments are relevant to this case, in which Plaintiffs attack, *inter alia*, the constitutionality of the State's

ballot harvesting restrictions in K.S.A. 25-2437. Two of the statements are nothing more than sarcastic rhetoric and anecdotes employed by the Secretary in his personal opposition to the proposed legislation. The third statement amounts to two hearsay comments from two rural county clerks about two late mail ballots they purportedly received three years ago. It is more than a stretch to suggest that these remarks have *anything* to do with the legal issues at play here.

K.S.A. 60-409(b)(4) states that the Court may take judicial notice of "specific facts and propositions of generalized knowledge which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." What *facts* have Plaintiffs presented here? *None*. All they have done is highlight three out-of-context remarks which reflect, at most, the Secretary's general opinion that the use of drop boxes is beneficial to the election process. Those comments come nowhere close to meeting the standard for which judicial notice may be taken pursuant to K.S.A. 60-409(b)(4).

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"The purpose of the judicial notice rule is to eliminate the necessity and time of requiring a party to make formal proof of a *fact* which cannot be disputed." *Perez v. Nat'l Beef Packing Co.*, 60 Kan. App.2d 489, 507, 494 P.3d 268 (2021) (emphasis added). Thus, to be judicially noticed, there must be some specific "fact" or "proposition of generalized knowledge." K.S.A. 60-409(b)(4). Statements of opinion, argument, and anecdote do not meet this bill.

The Secretary's first quoted comment, for example, was a rhetorical question he posed – laced with sarcasm – that targeted the inefficiencies of the U.S. Postal Service and the federal government in general. For good measure, he then threw in a personal anecdote

about a late Christmas card that he had personally received. Needless to say, neither remark constitutes a specific fact or proposition of "generalized knowledge," nor is either "capable of immediate and accurate determination."

The second statement represents two anecdotes – presumably from the hearsay of the county clerks in Ford County and Russell County – about two pieces of untimely mail they had received in connection with the 2020 election. Neither is a fact of "generalized knowledge." Indeed, we know nothing about the facts underlying either statement. And even if we did know, two pieces of late mail are hardly relevant or probative of any material fact at issue in the case at bar.

As for the third statement, the Secretary is clearly engaging in hyperbole. Unless Plaintiffs intend to introduce evidence that "black holes" exist on earth, there is no basis for taking judicial notice of this comment. Furthermore, Plaintiffs conveniently omit that the Secretary was referring to *Memphis, Tennessee*, not anywhere in Kansas, with his glib observation.

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B. The Context of the Secretary's Comments at the Hearing Underscores the Irrelevancy of His Statements to this Lawsuit.

S.B. 208, the bill on which the Secretary was testifying, would have restricted each county to only one ballot drop box, located solely at the county election office. *See* http://www.kslegislature.org/li/b2023_24/measures/documents/sb208_00_0000.pdf. The Secretary's remarks were an attempt to discourage the Legislature from imposing such a restriction on counties. Nothing in his testimony had anything to do with the numerous, and well-documented, problems that ballot harvesting creates.

Ironically, the Secretary predicated his opinion as to the utility of ballot drop boxes in large part on the signature verification requirements that Kansas law imposes. *See* 2/20/23 Committee Hr'g at 20:29-21:24. Yet Plaintiffs, while trumpeting the Secretary's promotion of drop boxes for use with mail ballots, seek to invalidate signature verification mandates. It takes considerable chutzpah to ask the Court to take judicial notice of out-of-context statements made by the Secretary about drop boxes while simultaneously ignoring his underlying basis for those remarks.

Although Plaintiffs cite to a series of cases addressing the reliance on judicial notice of testimony in legislative hearings, Mot. at 3-4, they fundamentally misunderstand the holdings in those cases. Because judicial notice is restricted to only those facts that "are capable of immediate and accurate determination," K.S.A. 60-409(b)(4), judicial notice of legislative testimony is necessarily confined to *the fact that a statement was made*; it cannot be used to prove "the truth of the matter asserted." *Kapersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 464 (D.C. Cir. 2018).

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When legislative testimony is received, it typically involves testimony presented to the Legislature to establish legislative purpose for the bill being challenged. *See id.* at 465 ("We therefore consult section 1634's legislative record to provide evidence of statutory purpose only – that is, what information Congress had before it when enacting the statute."). Thus, even if the Court were to take judicial notice of statements not directed at the particular legislation being challenged in this case, the Court could not accept as "fact" any of the statements made during such testimony.

In any event, the *Secretary's* own views on mail ballots are entirely irrelevant to the Court's resolution of this lawsuit. The *Legislature* has the authority to enact statutes in Kansas, not the Secretary. While the Secretary may have concerns with the U.S. Postal Service, such concerns have no bearing on this case. (In fact, the Postal Service's Inspector General released a report in March 2021 – of which this Court can take judicial notice – analyzing the "Service Performance of Election and Political Mail During the November 2020 General Election." *See* https://www.uspsoig.gov/sites/default/files/reports/2023-01/20-318-R21.pdf. That report reflected outstanding performance with regard to election mail.[1]) The Kansas Legislature permits ballots to be cast by U.S. mail, and hundreds of thousands of Kansans avail themselves of that option. Regardless of the Secretary's own personal opinion about voters mailing in their ballot, the only thing that matters is that such a feature remains a part of Kansas law.

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[1] According to the Report, "Election Mail was processed in time to meet its service standard 93.8 percent of the time, an increase of about 11 percentage points for Election Mail processed from the same time period in 2018. The on-time goal for Election Mail, generally sent as First-Class Mail, is 96 percent. While Election Mail processed on time did not meet this goal, it exceeded all other First-Class Mail processed on time by 5.6 percentage points, showing prioritization of this mail. Further, the Postal Service has not met its First-Class Mail service goal in five years." Report at 3. Even more impressive, of the ballots sent to voters from election offices within four days of the election – a time period that typically does not provide the Postal Service "the required time to process, transport, and deliver the ballots within the First-Class Mail service standard of 2 to 5 days," the Postal Service was able to deliver over 94 percent of those ballots to voters on or before election day due to due to the "extraordinary measures" it implemented. *Id.* And "[d]uring the week of the general election, 98.1 percent of identifiable ballots were processed in time to meet its service standard." *Id.*

C. *If Judicial Notice is to be Taken, the Full Context of Relevant Statements Must Also be Taken*

If judicial notice is to be taken of the Secretary's comments during his testimony on S.B. 208 – and there is no valid reason why it should – then this Court must likewise take judicial notice of the entirety of the Secretary's testimony, as well as other testimony from that hearing, particularly Attorney General Kris Kobach who is also a party to this suit. Indeed, in referencing the ballot harvesting laws that Plaintiffs attack in this case, Attorney General Kobach underscored:

- "Fraud involving the harvesting of ballots or ballot harvesting . . . is a very real thing and drop boxes make this type of fraud easier to . . . perpetrate." 2/20/23 Committee Hr'g 5:52-6:03.

- "The type of crime ballot harvesting occurs with significant regularity. With this crime, the perpetrator harvests ballots, meaning he collects as many advance ballots as possible. You can do this in a number of ways, you can intercept them at the mailbox; you can go door to door in neighborhoods where voters might be inclined to do this and pay people for their advanced ballot; you can ask people for their advanced ballot. But the bottom line is you acquire them and then you deliver them *en masse*." *Id.* at 6:50-7:18.

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- "Sometimes . . . depending on how the scheme is operated, the perpetrator will try to discern if the ballot has already been voted. Usually they collect ballots that are not yet voted, they ask the person to sign the envelope and then they, before it's being sealed, . . . go ahead and fill the ballot out for them. But if in some cases, they collect ballots that are already filled out and they attempt to determine which way the ballot went[.]" *Id.* at 7:20-7:40.

- "There's no dispute on this type of fraud . . . there's bipartisan agreement that this type of fraud does occur and I would point no further than North Carolina's Ninth congressional district election of 2018. In that case Republican operatives committed this fraud. They used a ballot harvesting scheme to fraudulently increase the number of votes for . . . the Republican . . . candidate Mark Harris. An operative working for Harris's campaign named Leslie Dallas Jr paid workers 125 bucks for every 50 mail-in ballots they could collect in Bladen and Robeson counties and then turn [them] into

him . . . he then filled them out, cast them . . . for the Republican. In the end Democrat Dan McCready lost by 905 votes. However, the North Carolina election board detected the fraud and . . . unanimously refused to certify the election and called for a special election . . . to redo that vote basically. . . . Democrat Speaker Pelosi said the following: 'This is bigger than one seat. This is about undermining the integrity of our elections. What was done there was so remarkable in that person those entities got away with it.'" *Id.* at 7:41-8:55.

- "[I]n either the 2008 or 2010 election cycle[,] Wyandotte County reported that more than 50 people had complained that . . . they had not requested an absentee ballot but an absentee ballot had been delivered anyway, either to their home or they went to . . . vote on Election Day and they were told that they'd already voted their ballot and it appeared that "other people were fraudulently requesting your ballot for you. And that's why . . . we require the signature on the requesting form when you request an absentee ballot. Now your signature has to be verified. But of course, that's just one half of the ballot harvesting scheme. The one way is to get the ballots. Then the other way is of course you have to drop them off without being caught. In the SAFE Act, Kansas did not address the second half of the ballot harvestings . . . the dropping off large numbers of advanced ballots . . . the fact that . . . 50 people noticed that someone else had asked for their advanced ballot, probably meant . . . that there were more than 50 total and it certainly suggested that there was a ballot harvesting scheme afoot." *Id.* at 9:16-10:37.

- "The argument against the ballet harvesting law is we just want to make it as easy to vote as possible, well . . . that argument proves too much. You could have internet . . . or text voting . . . but we don't do it because there's a security risk. . . . It's already very easy to vote in Kansas. You can vote on Election Day; you can vote by mail 20 days in advance; you can vote in person at the county election office; you can vote in person at a satellite election office. It's very easy to vote." *Id.* at 12:47-13:11

Each of these statements directly and conclusively describes the justifications for K.S.A. 25-2437. If this Court accepts Secretary Schwab's statements, it would also have to accept Attorney General Kobach's statements.

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CONCLUSION

The bottom line here is that there is no sound basis for this Court to take judicial notice of the Secretary statements – or at least the *substance* of any of the statements – that Plaintiffs reference in their motion. Accordingly, Plaintiffs' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 14th day of March 2023, I electronically filed the foregoing document with the Clerk of the Court pursuant to Kan. Sup. Ct. R. 1.11(b), which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above and foregoing was e-mailed to the following individuals:

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