



Graves Garrett LLC

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Via Email

Board of Canvassers of Johnson County, Kansas
c/o Ronnie Metsker
Johnson County Election Commissioner
2101 East Kansas City Road
Olathe, Kansas 66061

Re: Disallowance of 153 timely received advance voting ballots

Dear Commissioner Metsker:

We represent Dr. Jeff Colyer for Governor. It has come to our attention that the Board of Canvassers of Johnson County, Kansas, intends to disallow 153 timely received advance voting ballots. The Board intends to exclude each of these ballots based solely on an election worker's suspicion that the signature on the ballot envelope does not match the County's record of the signature for the corresponding registered voter. In many if not all cases in which there is no match, this occurs because a husband and wife have accidentally switched envelopes before signing, or one household member has signed for another—even though each household member voted his or her own ballot. We understand that this can readily be verified by simply reviewing signatures of the other household members.

But even more fundamentally, as discussed below, Kansas law does not require the "verification" of ballot envelope signatures as a condition precedent to counting votes. It certainly does not allow ballots to be cast out based solely on the suspicion of an election worker. As recognized by Johnson County's sister counties, including Sedgwick County, these 153 ballots must be counted.

In marked contrast, Kansas *does* require election authorities to verify a signature on a *request* for an advance ballot before processing that request. Because this

requirement could yield a severe result—that is, a Kansas voter could find it impossible to receive and cast an advance ballot based solely on the judgment of an election worker in reading a signature—Kansas provides a process that gives voters ample opportunity to cure any non-matching signature (or failure to sign at all) by providing the correct signature. As shown below, we can draw two lessons from this portion of the statute. First, where the legislature intended to instruct that a vote cannot be cast based on a signature verification issue, it did so with unmistakable clarity. Second, where it contemplated such a severe result, it chose not to rely solely on the game-time decision of an election worker. Instead, it built in safeguards so that a voter had ample opportunity to cure a non-conformity. That way, husbands and wives (or other family members) who innocently and accidentally sign the wrong envelopes can fix the mistake.

A detailed review of the statutes makes this clear. First, pursuant to K.S.A. 25-1122 (Session Laws 2018), advance voting ballots may be requested in person or by mail. “No county election officer shall provide an advance voting ballot to a person who is requesting an advance voting ballot to be transmitted by mail unless: (1) The county election official verifies that the signature of the person matches that on file in the county voter registration records, except that verification of the voter’s signature shall not be required if a voter has a disability preventing the voter from signing.” In this section, the legislature has therefore made it crystal clear that a specific action—the provision of a voting ballot, and later, the casting of a valid vote—simply cannot happen if the verification is unsuccessful. Contrast this with the provisions later in Chapter 25 relating to the voter’s marking and submittal of the ballot itself. Those provisions do not explicitly state that election workers must complete a signature verification at all. They certainly do not go on to provide that after a verification, the election authority “shall not” count votes if one or more election workers are unsatisfied after comparing the signatures.

It is helpful to return again to review the advance ballot “request” stage. If a voter has submitted a request and the signature requirement is not initially satisfied, there is an opportunity for the voter to cure: “the county election officer shall attempt to contact the person and shall offer the person another opportunity to provide the person’s signature for the purposes of verifying the person’s identity.” K.S.A. 25-1122. Significantly, even the failure of this cure does not end the matter for the voter. “If the county election officer is unable to reach the person, the county election officer may transmit a provisional ballot, however, such provisional ballot may not be counted

unless a signature is included therewith that can be verified[.]” *Id.* In short, in the one area of the advance voting process where Kansas requires signature verification and assigns a severe result for its failure, Kansas also provides ample opportunity for cure.

This analysis compels one conclusion: from the start to the finish of the advance voting process, the only category of ballots that may be lawfully excluded are provisional ballots where no signature has *ever* been provided, either in the request for the ballot or on the provisional ballot, and the voter lacks a disability preventing the voter from signing.

Kansas courts’ treatment of cases involving the casting of ballots reinforces this conclusion. Absent clear evidence of actual fraud, Kansas takes a permissive view that places special emphasis on the right to vote and excuses a voter’s failure to follow requirements that do not seriously call into question the voter’s intent. In *Cure v. Board of County Com’rs of Hodgeman County, Kan.*, 263 Kan. 779, 952P.2d 920 (1998), the plaintiff filed an election contest, alleging that votes were cast where capable voters were assisted, in violation of K.S.A. 25–1122, 25-1123, and 25–1124. The Supreme Court held that Kansas takes “a practical approach focusing on the purpose of the statute and the question whether the challenged act or omission impeded voters in exercising their voting rights.” *Cure* held that the ballots should be counted, since there was no evidence of fraud, misconduct, or other intentional wrongdoing, and the vote should presumptively count, even assuming another person provided assistance.

Notably, Kansas law otherwise contains an adequate deterrent for illegal conduct, other than voter disenfranchisement, in the form of criminal penalties for “[a]ny person assisting a voter who has an illness or physical disability or who is not proficient in reading the English language in applying for or marking an advance voting ballot who knowingly fails to sign and submit the statement required by this section or who exercises undue influence on the voting decision of such voter” K.S.A. 25-1124. *See also* K.S.A. 25-1128 (containing other crimes).

In conclusion, these 153 votes were cast by individuals who lawfully requested advance ballots, and whose signatures on their request forms matched voter records. This satisfied the *only* statutory requirement of a signature verification, and was the only stage at which voters could have been kept from casting a valid vote. The legislature has decided that, having passed this hurdle at the ballot request stage, voters should not be subjected to a second round of verification—and the concomitant

potential invalidation of their votes—at the ballot submittal stage. Further, at no stage does Kansas deny voters a ballot merely based on an election worker’s decision that two signatures don’t appear to bear sufficient similarity; it requires several attempts at a cure before a voter’s ballot is ultimately not counted. It would be illogical to read into the statutes a draconian penalty at the ballot submittal and counting stage, when on the one hand a voter’s receipt of an advance ballot already indicates a substantial reason to trust the reliability of the vote; but on the other hand, election workers have even less opportunity to conduct a careful eyeball review of signatures and voters have no chance to cure a simple mistake in envelope signatures that has nothing to do with voter intent.

In short, voter penalties should not be read into Chapter 25, and registered voters attempting to vote should not be punished for errors (often of some other person) that do not implicate the intent of the voter or validity of the vote. On behalf of Dr. Jeff Colyer for Governor, we insist that you count the 153 timely received advance voting ballots.

Please contact me immediately if you have any questions or concerns regarding this letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Edward D. Greim".

Edward. D. Greim