



# Kansas Secretary Of State

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April 28, 2018

## VIA EMAIL

Senate President Susan Wagle  
Speaker of the House of Representatives Ron Ryckman  
Kansas State Capitol  
Topeka, KS 66612

Re: Jennings Proviso

Dear Senate President Wagle and Speaker Ryckman:

This letter concerns a proviso added to the budget bill by motion of Representative Russ Jennings on April 28, 2018 (the "Jennings Proviso"). The Jennings Proviso would prevent any State funds from being used to pay for any fees resulting from the civil contempt order against the defendant in the case of *Fish v. Kobach*. As is explained below, the Jennings Proviso is illegal and would require the State to expend significant resources in any futile attempt to defend it.

In *Fish v. Kobach*, Secretary Kobach was sued in his official capacity, not in his personal capacity. When a State officer is sued in his official capacity, it is the legal equivalent of a suit against the State itself. As the United States Supreme Court has explained: "[A] 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. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). As such, it is no different from a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). It is the Office of the Secretary of State that is being sued, not Kris Kobach personally. That is why the title of the case will change in January 2019 from *Fish v. Kobach* to *Fish v. [name of new Secretary]*. In his personal capacity, Kris Kobach is not a party to the suit.

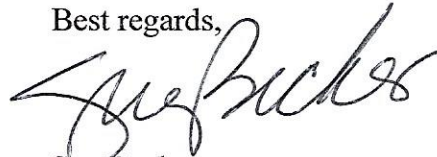
When a State officer is sued in his official capacity, any remedy ordered by the court (actions to be taken or fees to be paid) must be satisfied by the State itself. *Hutto v. Finney*, 437 U.S. 678, 700 (1978) ("since petitioners are sued in their official capacities . . . it is obvious that the award will be paid with state funds."). The named official stands for the State office itself. *Id.* ("Congress recognized that suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself."). Further, because Secretary Kobach was a government official performing a discretionary duty by defending the State's law, he is personally "shielded from liability for civil damages." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that defending a lawsuit against the State is a discretionary function). The only entity that can pay any fees imposed by a court in this context is the State.

A State cannot avoid this liability by simply passing a statute declaring that the State will not pay. If it attempted to do so, it would be in conflict with the Supreme Court precedents listed above. In addition, such a statute would be inconsistent with the Kansas Torts Claim Act (“KTCA”), which states that absent an intentional tort (wanton, willful or gross negligence), a State actor cannot be held liable for damages. See K.S.A. § 75-6104(e). In sum, if the Jennings Proviso were to be enacted, it would be legally invalid for multiple reasons. And it would inevitably lead to further litigation—litigation that the State would lose.

Finally, you should be aware that the reason for the civil contempt order in *Fish v. Kobach* was that the Judge sought to have the counties send affected voters two notices in the weeks preceding the November 2016 election. The Secretary of State’s Office instructed the counties to do so. But in the busy pre-election period, some counties sent only one of the two notices to voters. The Judge issued the civil contempt order against the Secretary of State’s Office based on her incorrect understanding that the Secretary of State’s Office has the legal authority to compel the counties to act. It was the Office that was found to be in noncompliance, not Secretary Kobach as an attorney and not Secretary Kobach personally. Further, to clarify any possible misconception regarding the word “contempt,” there was no disrespectful behavior on the part of the Secretary or his legal team; and, indeed, none was alleged by the Plaintiffs in the case. The basis for the order was that the Office did not ensure that all of the counties mailed these postcards. The Secretary of State’s Office will be appealing the civil contempt order to the U.S. Court of Appeals for the Tenth Circuit.

If you have any questions about this matter, please do not hesitate to contact us.

Best regards,

A handwritten signature in black ink, appearing to read "Sue Becker". The signature is fluid and cursive, with a large initial "S" and "B".

Sue Becker  
Senior Counsel