

ELECTRONICALLY FILED
2020 Jul 28 AM 9:25
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2020-CV-000127



Court: Shawnee County District Court
Case Number: 2020-CV-000127
Case Title: Kansas Democratic Party, et al. vs. Scott Schwab -
Secretary of State for State of Kansas
Type: Memorandum Decision and Order

SO ORDERED.

A handwritten signature in black ink that reads "Thomas G. Luedke". The signature is written in a cursive style with a large, prominent "L" and "k".

/s/ Thomas G. Luedke, Honorable District Court
Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX**

KANSAS DEMOCRATIC PARTY, ET AL,)	
Petitioners,)	
)	Case No. 2020-CV-000127
)	
vs.)	
)	
SCOTT SCHWAB, in his official capacity as the)	
Secretary of State for the State of Kansas)	
Respondent.)	

Memorandum Decision and Order
on the Motion to Dismiss and Motion for Summary Judgment

ON the 1st day of July 2020, this matter was before the Court for a video hearing on the Petitioners’ *Motion for Summary Judgment* filed on May 1, 2020, and the Respondent’s *Motion to Dismiss* filed on March 30, 2020. The Petitioners appeared by counsel Henry (Hal) Brewster, Pedro Irigonegaray, Jason Zavadil, J. Bo Turney, and Nicole Revenaugh. The Defendant appeared by counsel Arthur Chalmers. All parties appeared by Zoom. The Court took the matter under advisement and is now ready to rule.

Introduction

This case was initially filed by Petitioners as a mandamus action to compel the Kansas Secretary of State to formulate rules and regulations for the implementation of the recently enacted “Vote Anywhere Act.” The Petitioners requested that these rules and regulations be in place in time for the 2020 general election. The Petitioners later withdrew their request for mandamus relief, but maintained their request to enjoin the Secretary from attempting to “obstruct” the implementation by local county election officials of the Vote Anywhere Act. The

Petitioners have filed a motion for summary judgment. The Secretary has filed a motion to dismiss for lack of jurisdiction and failure to state a claim.

Procedural History

1. On April 25, 2019, K.S.A. 25-2701(a)(1) became the law in the state of Kansas. It provides:

(a) (1) The county election officer shall determine the area to be served by each voting place at every election and shall provide notice of such voting places as required by law. At the discretion of the county election officer, all voters within a county may be allowed to vote at any polling location on election day, provided all rules and regulations are followed as established by the secretary of state for such purpose.

This new law has been referred to by the Petitioners as the “Vote Anywhere Act.” For convenience, the Court will adopt that shorthand.

2. On February 14, 2020, the Petitioners filed a *Petition for Writ of Mandamus* (hereafter referred to as Mandamus) with this court. The Mandamus sought relief as follows:

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

b. In the alternative, an order declaring the Secretary’s refusal to implement the law a violation of the Kansas Constitution and an injunction permitting the counties the discretion to permit all voters in the county to vote at any polling location on election day, following the procedures already used to provide voters the same option during the advance voting period.

c. Such further relief as this Court deems just and proper attributable to Respondent’s refusal to perform his specific duties under the law.

Mandamus, p. 13-14. The primary action for mandamus was requested pursuant to K.S.A. 60-801. Alternatively, injunctive and declaratory relief was requested pursuant to K.S.A. 60-1701, 1703 (declaratory relief) and 60-901, 902 (injunctive relief).

3. In response to the Mandamus, the Secretary of State, Scott Schwab (hereafter Secretary), filed a *Motion to Dismiss* on March 30, 2020, pursuant to K.S.A. 60-212(b)(1), (lack of subject matter jurisdiction) and K.S.A. 60-212(b)(6), (failure to state a claim). The 60-212(b)(1) dismissal was based on an alleged lack of standing to prosecute the action. The 60-212(b)(6) dismissal was based upon the lack of a clearly defined duty under K.S.A. 25-2701 requiring the Secretary to act.

4. On April 30, 2020, the Petitioners filed a memorandum of law in opposition to the Secretary's motion to dismiss. In opposition to the Secretary's motion, the Petitioners argued that they had both direct and associational standing to pursue their cause of action. The Petitioners also argued that their petition states a cognizable claim for relief.

5. On May 1, 2020, the Petitioners filed a motion for summary judgment contending there was no material dispute related to their request for injunctive and declaratory relief in that the Secretary conceded that K.S.A. 25-2701 ("Vote Anywhere Act") extended discretion to the county election officers to implement law in their jurisdictions. However, to the extent the Secretary promulgated rules and regulations for that purpose, those rules and regulations must be followed by the county election officials. The Secretary responded to the Petitioners' motion for summary judgment, contending that the Court first must decide his motion to dismiss. Additionally, the Secretary contended there were genuine issues of material fact that precluded summary judgment.

6. In the *Petitioners' Memorandum of Law in Opposition to Motion to Dismiss* filed April 30, 2020, the Petitioners withdrew their request for mandamus relief stating: "[P]etitioners voluntarily withdraw their request for a writ of mandamus requiring the Secretary to issue the rules and regulations that he previously indicated to the counties he felt he had to issue for vote

center voting to be implemented on election day.” p. 8. The alternative declaratory/injunctive relief requested by the Petitioners remains to be resolved.

Defendant’s Motion to Dismiss, K.S.A. 60-212(b)(1)

A. Subject Matter Jurisdiction

The Court’s authority to act is dependent on its jurisdiction. The Secretary contends the Court lacks jurisdiction to resolve this case. Subject matter jurisdiction is defined as the Court’s ability to exert its authority in any given case. *State v. Dunn*, 304 Kan. 773, 784, 375 P.3d 332 (2016). To exercise its ability to intervene in a dispute, the Court must have a grant of authority derived from either a statute or a constitution. *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). The Kansas Constitution provides jurisdiction to Kansas courts for cases and controversies. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014), *Sierra Club v. Moser*, 298 Kan. 22, 29, 310 P.3d 360 (2013). Standing is a component of subject matter jurisdiction. *Stechschulte v. Jennings*, 297 Kan. 2, 29, 298 P.3d 1083 (2013). Considerations of standing and ripeness are ingredients of both subject matter jurisdiction and a case or controversy. *Sierra Club*, 298 Kan. at 29.

Under the Kansas case-or-controversy requirement, in order to pursue a legal action courts require that: (a) parties have standing; (b) issues not be moot; (c) issues be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) issues not present a political question. *Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008). “Standing is ‘a party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *Gannon*, 298 Kan. at 1121, (quoting *Board of Miami County Comm’rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 324, 255 P.3d 1186 (2011)). The elements required for standing are: (1) plaintiff suffered a cognizable injury, and (2) there is a causal connection

between the injury and the defendant's conduct. *Solomon v. State*, 303 Kan. 512, 519, 364 P.3d 536 (2015). Both subject matter jurisdiction and case-or-controversy require a plaintiff be injured in some way. The Secretary contends there is no case or controversy and no subject matter jurisdiction because the Petitioners' lack standing to bring the suit.

The Petitioners' request declaratory/injunctive relief as follows:

[I]njunction permitting the counties the discretion to permit all voters in the county to vote at any polling location on election day, following the procedures already used to provide voters the same option during the advance voting period.

Mandamus p. 14

Declaratory relief is only available when there is an actual controversy between the parties. *In re Estate of Keller*, 273 Kan. 981, 984-85, 46 P.3d 1135 (2002). Additionally, "a court's jurisdiction to issue an injunction is dependent upon the existence of an actual case or controversy." *Shipe v. Public Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 165, 210 P.3d 105 (2009). As noted above, to issue a declaratory judgment or an injunction, Kansas courts require that (1) the parties have standing, (2) the issues are not moot, (3) the issues are ripe and not "nebulous and contingent," and (4) the issues do not present a political question. *See Shipe*, 289 Kan. at 165-66; *Baker v. City of Overland Park*, No. 101,371, 2009 WL 3083843, at *3 (Kan. App. 2009) (unpublished opinion).

1. Standing

In order to have standing, a litigant must have a "sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy." *Moorhouse v. City of Wichita*, 259 Kan. 570, 574, 913 P.2d 172 (1996). Additionally, "if a person does not have standing to challenge an action or to request a particular type of relief, then 'there is no justiciable case or controversy' and the suit must be dismissed." *Board of Sumner*

County Comm'rs v. Bremby, 286 Kan. 745, 750, 189 P.3d 494 (2008) (quoting *Kansas Bar Ass'n v. Judges of the Third Judicial Dist.*, 270 Kan. 489, 490, 14 P.3d 1154 (2000)). Under the traditional test for standing in Kansas, “a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.” *Cochran v. Kansas Dept. of Agriculture*, 291 Kan. 898, 908-09 (2011), (quoting *Bremby*, 286 Kan. at 761). Cognizable injury is also referred to as an injury in fact. *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 406, 197 P.3d 370 (2008). Any injury must be concrete, particularized, and actual or imminent. *Ternes v. Galichia*, 297 Kan. 918, 921, 305 P.3d 617 (2013). Furthermore, the injury must be one that can be redressed by the Court. *Ternes v. Galichia*, 297 Kan. 918, 921 (2013). Standing, either direct standing or associational, requires some sort of injury or threatened injury.

2. *Injury*

The Petitioners identify their injury as follows:

Unless the Secretary is enjoined from reverting to his original position, and acting to undermine or prohibit the power of the county elections officials to implement voting center voting on election day, Petitioners will be directly injured, because the Secretary’s actions make it less likely that all of the voters who would otherwise support the Democratic Party in the coming elections will be able to vote a full ballot successfully.

Petitioners’ Memorandum of Law in Opposition to Motion to Dismiss, p. 2. Implicit in this statement is that there currently exists no case or controversy. Any issue between the parties is moot. The relief requested by the Petitioners is based solely upon the fortuity of the Secretary “reverting to his original position.” This implies that the present position of the Secretary, i.e. the plain language of K.S.A. 25- 2701(a)(1), leaves the implementation of the Vote Anywhere Act to the discretion of county election officials, and is not injurious or objectionable to the Petitioners. It appears that both parties now read the statute to have the same meaning. This

harmonious confluence renders the controversy moot. A case is moot when the actual controversy has ended and any judgment by the Court would not impact the rights of the parties. *State v. Montgomery*, 295 Kan. 837, 840-41, 286 P.3d 866 (2012). The Kansas Supreme Court recently reviewed the historical and legal considerations of the doctrine of mootness at the appellate level. *State v. Roat*, No. 113,531, 2020 WL 3395865, at *2–15 (Kan. June 19, 2020). When the dust cleared, it appeared the Kansas Supreme Court adopted the position that the doctrine of mootness was more a prudential concern than a jurisdictional concern. In *Roat*, the issue of mootness was analyzed in the context of a pending appeal. In this case, the mootness aspect is tied to the evaporation of the controversy.

The Petitioners argue, citing *Stano v. Pryor*, 52 Kan.App.2d 679, 372 P.3d 427 (2016), that the Secretary’s voluntary cessation of the alleged illegal conduct does not render the issue moot. Once again, this argument implicitly recognizes that the conduct of the Secretary, which initially provoked the lawsuit, has terminated. The Petitioners, however, contend that the relief they request is required to “counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct.” Petitioners’ *Memorandum of Fact and Law Supporting Petitioner’s Motion for Summary Judgment*, p. 9, n. 2, quoting *Stano*, 52 Kan. App. 2d at 683. As noted in *Stano*, however, voluntary action may still moot an issue if it can be said there is no reasonable expectation that the violation will re-occur or that events have completely and irrevocably eliminated any effects of the alleged violation.

B. Discussion

As an initial matter, the Court is skeptical that there was any violation by the Secretary in the first instance. Be that as it may, the Court finds there is no reasonable expectation that any

alleged violation will re-occur and that any effects of any alleged violation have been eradicated. The Petitioners claim the Secretary has made no indication that “he intends to publicly reverse his position or affirmatively direct county elections officials that they are free to implement the law however they please.” Petitioner’s *Memorandum of Fact and Law Supporting Petitioner’s Motion for Summary Judgment*, p. 9. Prior to this statement, however, the Petitioners indicated that the Secretary’s motion to dismiss conceded that the statute left the implementation of the Vote Anywhere Act to the ultimate discretion of the county election officials. This seems to be a very public reversal of any previously alleged contrary position. Furthermore, the most certain deterrent to any reversion of an alleged previous position is the plain language of the statute itself. The Secretary has unequivocally noted that: “The amendment, which petitioners call ‘Vote Anywhere,’ allows ‘Kansas counties like Sedgwick, **at their discretion**, to use the same voting center procedure on election day.’” [Emphasis original.] Respondent’s *Memorandum in Support of Motion to Dismiss*, p. 5, quoting Petition, ¶ 23. Both parties agree, as they must, that the statute leaves the implementation of the Vote Anywhere Act to the utter discretion of the county election officials. The only caveat is that if the county officials do implement the law, it must not conflict with any preexisting rules and regulations formulated by the Secretary.

The case that it was the Secretary’s “obstruction” that kept county election officials from implementing the Vote Anywhere Act is not compelling. As an initial matter the Court would note that three full months remain before the general election. It is theoretically possible that voting centers could still be made operational, particularly in light of the apparent ease with which the transition might be made. See Exhibit B to Petitioner’s *Memorandum of Law in Support of Petition for Writ of Mandamus*, Affidavit of James Howell in Support of Petition for Mandamus: “Implementing the Vote Anywhere Act, as codified in K.S.A. 25-2701, for the entire

County [Sedgwick] on Election Day would as easy as flipping a switch; the County already possesses all the necessary technology.”

Pursuant to K.S.A. 19-3419, the Secretary of State is responsible for appointing election commissioners for counties having a population of 130,000 or more. There are approximately four counties in Kansas having a population over 130,000.¹ These election commissioners are appointed for terms of four years by the Secretary and can be removed during their term for official misconduct. For these jurisdictions it is conceivable that the threat of non-reappointment could provide substantial coercion. However, while the statute provides for the appointment of a successor every four years, it is silent on the issue of whether an election commissioner can be appointed for successive four-year terms. The threat of coercion could only exist if the Secretary had the option to appoint for additional terms. Otherwise, removal could only be for cause or expiration of the term. In counties of a population of less than 100,000 residents, the county clerks, who are elected, are the election officials for those counties.

It is the duty of the Secretary to adopt rules and regulations governing the procedures and forms necessary for elections. K.S.A. 25-440. The statute states that the Secretary’s authority in this regard requires liberal construction. The Secretary is the chief election officer in the state. K.S.A. 25-2504. Therefore, it is the duty of the Secretary to opine on, and engage rules and regulations related to the implementation of election laws. In performing this duty, it would stand to reason that he may be required to communicate with county election officials. The Court finds nothing particularly nefarious about the Secretary communicating with county election officials to discuss rule making for the implementation of the Vote Anywhere Act. Advice and prognostication by the Secretary on his ability to have effective and symbiotic rules and regulations in place for implementation of the Vote Anywhere Act is not illegal conduct. As

¹ https://www.kansas-demographics.com/counties_by_population.

might be expected, the coordination and interplay of the various rules and regulations related to elections is significant. It might not be as easy as “flipping a switch.” It would be an abrogation of his duties as the chief election official for the State of Kansas for the Secretary to implement the laws he is required to coordinate without thoughtful consideration of their interplay. It would be incumbent upon the Secretary to provide election officials with his candid and realistic assessment related to the potential implementation of the Vote Anywhere Act. The Petitioners cannot be harmed by the Secretary’s faithful execution of his duties, particularly when the actions of the Secretary are afforded liberal construction. Additionally, it would be inoffensive for a county election official to consult with the Secretary to inform their discretion as to whether they might successfully implement the Vote Anywhere Act in their jurisdiction.

The implementation of the Vote Anywhere Act is in the complete discretion of the county election officials, whether or not the Secretary devises any rules or regulations. It makes sense that the legislature would leave the implementation of this law to local officials. They are the people most intimately involved in the operation of the law. They are best suited to assess the efficacy of the law as adapted to their jurisdiction. They can adopt its provisions if it works or reject them if it does not. If the Secretary devises regulations, the election officials must follow them, but the implementation of the law remains in the discretion of the locals. Generally speaking, the Court cannot order a government agency to perform a discretionary act. *Bischoff v. Meyer*, 54 F.Supp.2d 1226, 1230 (D. Wyo., 1999), aff. *Bischoff v. Glickman*, 2000 WL 743686 (10th Cir. 2000); *Baca v. King*, 92 F.3d 1031, 1035-37 (10th Cir. 1996); *McKeen v. U.S. Forest Serv.*, 615 F.3d 1244, 1255 (10th Cir. 2010).

The Petitioners argue that *Bay County Democrats v. Land County*, 347 F. Supp. 2d 404 (E.D. Mich. 2004), supports their claim to standing. In that case, the Federal District Court for

the Eastern District of Michigan found standing for a political organization to challenge a directive of the Michigan Secretary of State that provisional ballots cast by voters outside their own precincts not be counted. The federal district court found that the Bay County Democrats and the other political association involved in the suit had standing to sue the Michigan Secretary of State for declaratory and injunctive relief. That case centered around a nine-page memorandum issued by the Michigan secretary directing that provisional ballots of voters who voted outside their precincts not be counted.

The harm alleged in *Bay County* and the harm alleged in this case are distinguishable. In *Bay County*, there was a written directive stating that said provisional ballots would not be counted. In this case, the Secretary issued no directives that have been provided by the Petitioners, therefore the character of any communication by the Secretary to the county election officials is impossible to assess. In fact, as is the fashion, the Petitioners cite only to media articles in support of their obstruction/coercion allegation. Other than to issue rules and regulations that blend in with those already in existence, the Secretary had no other role in the process. Furthermore, there is no requirement that K.S.A 25- 2701(a)(1) be implemented at all. It is completely discretionary with the county election officials. Additionally, there is no time frame specified in the statute for the implementation of the law. It is difficult to imagine that the Petitioners can be harmed by the failure to implement a statute that has no requirement that it be implemented, or be implemented by a certain time when the statute specifies no timeline. These vagaries clearly highlight the speculative nature of any impending harm claimed by the Petitioners. Based on the wording of the statute, any harm to the Petitioners is neither concrete, particularized, nor actual or imminent. Therefore, the Petitioners cannot demonstrate injury in the context of the Court's jurisdiction.

The right to vote is fundamental. *O'Brien v. Skinner*, 409 U.S. 1240, 1242 (1972). The right to vote in the most convenient manner possible, although a laudable goal, is not. As its name implies, the Vote Anywhere Act is more a creature of voting convenience. See *Fleming v. Gutierrez*, 2014 WL 12650657, at *1–11 (D.N.M. Sept. 12, 2014) (“In 2012, New Mexico introducing voting convenience centers (“VCC’s”) which combined precincts in urban areas allowing voters to vote at any VCC regardless of whether the VCC was located in their precinct.”). See also Exhibit C to Petitioner’s *Memorandum in Support of Petition for Writ of Mandamus*, Supplemental Note on Senate Bill No. 129: “Sedgwick County Commissioners provided proponent testimony, stating the bill would reduce the number of provisional ballots and make voting more convenient for voters.”

The Petitioners argue that: “Unless Petitioners are successful in obtaining the relief they seek, there is a high likelihood that the Secretary’s actions will effectively preclude the use of voting centers on election day.” *Petitioners’ Memorandum of Law in Opposition to Motion to Dismiss*, p. 3. In essence, the Petitioners argue they will be harmed by the failure to make voting more convenient. As noted by the Secretary, the precinct scheme for voting has been in place for over a hundred years. *Memorandum in Support of Motion to Dismiss*, p. 2. A state’s regulation of the time, place and manner of voting is constitutional. Art. I, § 4, cl. 1. If the Vote Anywhere Act is not implemented by the 2020 general election, and there is no requirement that it must be, the Petitioners will be no worse off than they were in the last election. The precinct scheme will be the same as it has been for over 100 years, existing harmoniously, unchallenged by conflict with any constitutional mandate. The Petitioners have made no contention that they will be harmed if the present precinct system remains in place for the 2020 election. In essence, they argue they will be harmed if voting is not more convenient. It is hard to see, if they are not

harmful by the current system, how they would be harmed by maintaining the status quo. The argument that failure to implement the Vote Anywhere Act would result in failure to count out-of-precinct votes for down-ballot elections ignores the fact that the entire application of the law rests with the discretion of the local county election officials. Which means those out-of-precinct ballots will still not be counted if the county election official decides the Vote Anywhere Act is not right for their jurisdiction.

The Petitioners also argue that the presence of the COVID-19 virus makes it more imperative that the Vote Anywhere Act be implemented. The problem with this idea is that the Vote Anywhere Act will tend to concentrate voters at specific voting centers. The greater the number of voters in one area, the more likely the virus is to spread and the more difficult it will be to maintain social distancing. Spreading voters out geographically would seem consistent with the venerated principle of social distancing.

Finally, it is plausible that some local jurisdictions could implement K.S.A. 25-2701(a)(1) in time for the general election in 2020. The Petitioners' claim to harm founders on the discretion of the local election officials. If one, none, all, or any combination of these jurisdictions implement or fail to implement the Vote Anywhere Act, what harm will the Petitioners incur?

C. Conclusion

In, based on the foregoing, the Court finds the Petitioners have failed to meet the injury requirement necessary for either subject matter jurisdiction or justiciability.

Defendants' Motion to Dismiss, K.S.A. 60-212(b)(6)

A. Discussion

When reviewing a motion to dismiss based on K.S.A. 60-212(b)(6), the Court considers the facts in a light most favorable to the plaintiff and assumes them to be true for purposes of the motion. Dismissal is improper when the well-pleaded facts state any claim upon which relief can be granted. *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013). Dismissal is appropriate only when the allegations in the complaint clearly show the plaintiff has no claim. *Steckline Communications, Inc. v. Journal Broadcast Group of KS, Inc.*, 305 Kan. 761, Syl. ¶ 2, 388 P.3d 84 (2017).

There is some irony in the Petitioners' statement:

As noted above, in response to this litigation the Secretary materially changed his position as to whether county elections officials have the authority to offer vote center voting absent the Secretary's issuance of rules and regulations to govern that activity. See *supra* at Part I.B.1.

When compared to their Mandamus:

This case involves Respondent Secretary of State's (the "Secretary") refusal to comply with his clear legal duty to implement a law duly passed by the state legislature on a broad, bipartisan basis more than ten months ago.

The fact of the matter is that the language of the law has not changed since its enactment. The plain language of the law never imposed a duty on the Secretary to do anything. In fact, the only duty imposed by the law was the requirement that county election officials follow the rules and regulation of the Secretary if and when they were formulated. Where the language of a statute is plain and unambiguous nothing further should be read into it. *Coastal Credit, LLC v. McNair*, 57 Kan.App.2d 31, 38, 446 P.3d 495 (2019). Be that as it may, the statute never created a "legal duty" on the part of the Secretary to implement this law.

The Petitioners alleged that “the Secretary’s obstruction of the counties’ implementation of the Vote Anywhere Act impermissibly burdens the right to vote guaranteed by Sections 1 and 2 of the Kansas Bill of Rights.” *Mandamus* ¶¶ 39-41. There is agreement between the parties that implementation of the Vote Anywhere Act is up to the discretion of the county election officials. The Petitioners characterize the Secretary’s position that he will not be ready to promulgate sufficient rules and regulations related to the Vote Anywhere Act in time for the 2020 election as obstruction.

The question is this: even if the Secretary engaged in the obstructive conduct alleged by the Petitioners, how did that create a burden upon the right to vote? Does failing to make voting as convenient as possible burden the right to vote? This is not a case where a state has created any impediment to voting as it currently exists. The Petitioners have not challenged the current Kansas voting system as burdensome to the vote. It would seem to follow that if the present system does not burden the right to vote, then the failure to implement a law making the present system more convenient creates no more of a burden. The cases cited by the Petitioners discuss laws enacted that in some way were alleged to burden the right to vote, i.e. make voting more onerous. In this case, we have a law with only a discretionary mechanism for implementation that, far from burdening the right to vote, makes it more convenient for some voters if enacted. If the Vote Anywhere Act is not implemented in time for the 2020 election, the Petitioners and the voters with which they associate will be no worse off than they were prior to the enactment of the law. In the final analysis, even accepting the Petitioners’ premise that the Secretary succeeded in coercing the state election officials into not implementing the Vote Anywhere Act, the Petitioners are no worse off than they were before the passage of the law. Furthermore, as

mentioned above, three months remain during which the law may be implemented. Therefore, the Petitioners cannot claim harm and cannot state a claim.

Even this realization, however, is somewhat academic in that both the Petitioners and the Secretary acknowledge the Secretary has no power to effect the implementation of the law. The Secretary, therefore, is in no position to inflict the harm claimed by the Petitioners unless he engages in a reversion to his alleged original position.

The Petitioners argue: “It should be beyond serious dispute that, when the state’s chief elections official acts to impede the availability of voting mechanisms that the Legislature has opted to provide the citizenry, he violates the right to vote guaranteed by Sections 1 and 2 of the Kansas Bill of Rights.” *Petitioner’s Memorandum of Law in Opposition to Motion to Dismiss*, p. 11. This observation mischaracterizes the issue. First, the legislature did not provide this as a voting mechanism for the public. The legislature provided the discretion to county election officials as to whether to provide the Vote Anywhere Act to the voting public. The legislature simply gave local county officials the option to implement the law. Secondly, advice by the Secretary from his perspective on the practicality of implementing the law by the 2020 election cannot be characterized as obstruction.

It should also be self-evident that the failure to implement this law by the 2020 election, or even anytime thereafter, does not implicate the rights guaranteed under Sections 1 and 3 of the Kansas Bill of Rights. The Vote Anywhere Act is not a subtraction. It is an addition. It takes nothing away from what previously existed unchallenged nor burdens in any way the current system of voting.

B. Conclusion

Therefore, based on the foregoing, the Court grants the Secretary's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.

Petitioners' Motion for Summary Judgment

Having dismissed this action, Petitioners' Motion for Summary Judgment is denied as moot.

IT IS SO ORDERED.

This order is effective as of the date and time on the electronic file stamp.

Thomas G Luedke, District Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Decision and Order was filed with the Clerk of the District Court and a copy served on the 28th day of July 2020, via electronic notification through the E-filing system to:

Pedro Irigonegaray – counsel for the Petitioner
Arthur Chalmers – counsel for the Defendant

/s/ Jennifer Light
Jennifer Light, Administrative Assistant