

TESTIMONY OF  
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IN OPPOSITION TO SB 37  
KANSAS SENATE ETHICS, ELECTIONS, AND LOCAL GOVERNMENT COMMITTEE  
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Thank you, Chair Bowers, and members of the Ethics, Elections, and Local Government Committee for allowing me the opportunity to provide testimony on SB 37. My name is Andrea Boyack and I'm a professor of law at Washburn University, but I'm here in my own capacity and anything I say here is in my personal capacity and not as a representative of Washburn Law School.

Voter registration requirements in Kansas are among the most onerous in the country – stricter than in 43 other states – and that is even absent this pending legislation. In Kansas, voters cannot simply wake up on Election Day and decide to vote. There is no spur-of-the-moment voting in this state, and no mail-in ballots other than absentees. Voting in Kansas requires forethought and planning through advance registration, and it takes showing up at the polls with a valid ID and having one's photo and signature confirmed to be a match to those on the registration, but at least, thanks to the 10th Circuit's [opinion](#) on October 21st, back on Election Day 2016, it did not require voters to provide *additional* documentary evidence of U.S. citizenship at the time of registration. The proposed legislation, however, will change that.

If this bill is passed, every person who registers to vote must, at the time of registration, provide “satisfactory evidence of United States citizenship” according to enumerated documentation, such as a U.S. passport or a birth certificate. Now, at first glance, this requirement sounds imminently reasonable – after all, only citizens of the United States may vote, and it is illegal for any non-citizen to register to vote or cast a ballot in the election. So why is it a bad idea to require documentary evidence of United States citizenship to register? Why does the Kansas League of Women Voters and the ACLU oppose this requirement? Why did the 10<sup>th</sup> Circuit hold that this very same requirement is *illegal* under federal law and runs afoul of the [National Voter Registration Act](#)?

The best way to understand why this bill is a bad idea is to compare the “threat” of illegal voting that the proposed legislation is purportedly preventing to the actual, demonstrable, quantifiable harm that it will cause. The “threat” in this case is that non-citizens – people who are *legally* here, but not native-born or naturalized citizens of the United States – will be able to vote in elections, perhaps even accidentally by erroneously signing voter registration forms when they obtain their driver's licenses. I spent several hours trying to figure out how easy or hard it would be for a non-citizen to vote in an election in this state, and it seems abundantly clear to me that in order for a non-citizen to do this, the non-citizen would have to falsely affirm citizenship. And the non-citizen would have to make this false affirmation on a document that specifically warns the non-citizen that doing so breaks a federal law and risks imprisonment and/or

deportation. I seriously doubt that non-citizens would deliberately take this huge risk in order to cast a vote. And we have no evidence at all that any non-citizen has actually done so. The threat is hypothetical at best. Possible, sure, but all things considered, implausible.

Let's balance this possible but implausible threat against the significant, actual, demonstrable, quantifiable harm that this additional voter registration requirement will cause: the disenfranchisement of at least 18,000 Kansans. Consider the reality of how people register to vote. Either they do this when they get their driver's license (the sort of voter registration that is specifically protected by federal law), or they register at one of several "get out the vote" voter registration drives periodically held at community venues such as libraries, schools, community centers, churches, etc.

I don't know about you, but when I go to church, when I go to the library, when I go to my children's school or to mommy-and-me gymnastics class at the local community center, I do *not* bring my birth certificate or my passport along with me. Ours is a society in which citizens are *not* required to carry their "citizenship identification papers" with them as they go about their daily lives. It is absurd to presume that people do this, and, indeed, I do not think that we want them to. I've been to places where people are expected to have their "papers" on their person at all times, where authorities can stop you on the street and demand that you prove your right to be there - the USSR during communism, certain African nations, parts of the Middle East. So I've seen societies where the expectation is that you will carry proof of your citizenship on your person. Believe me, we do not want that to become our reality.

So if people are not carrying their "papers" with them to the library or to church, they will not be able to register to vote at these "get out the vote" registration drives. These registration drives are the primary way that people become registered to vote if they do not register when they get their driver's license. Remember, already in Kansas, we do not allow people to show up at the polls and just vote - even if they show up at the polls bearing with them every sort of documentation that anyone could possibly dream to require. Voters in Kansas *must* register far in advance, and, simply put, this legislation would make it harder for them to do that. This means that fewer citizens will register. Fewer registered voters means fewer citizens will vote. Fewer voters participating in our democracy means fewer Kansans will have their voices heard. Is this really what we want?

We already know that this requirement disenfranchises more than 18,000 Kansans. These are real, live individuals who have the right to vote by law, not some hypothetical, possible non-citizen who theoretically files a false affidavit in order to cast a vote. These are the people whose right to vote in *federal* elections was already upheld by the 10<sup>th</sup> Circuit this past fall. This bill would take away that right to vote for those same people, disenfranchising them with respect to state elections. Supposedly, we can thread the needle of legality if we pass this bill and disenfranchise these folks locally even though our state lacks the power to disenfranchise them in federal elections, but how this would be accomplished is, frankly, unclear. Would we set up a two-tiered voting system? Would state elections be held separately from federal elections? In addition to the disenfranchisement impact, creating an inconsistency between state and federal voting eligibility requirements would create a huge practical mess.

In short, I ask you to consider what it is we are trying to do with our voter registration system. Do we want to encourage citizens to vote? I suggest the answer should be a resounding yes. The majority of Kansans already fail to vote in elections. Nationally, the Pew Research Center estimates that 22% of the population of eligible voters never registers – and this number is almost certainly higher in Kansas where the voter registration requirements are relatively more onerous. And in Kansas last year – even with higher than expected voter turnout – only 2/3 of those registered actually turned out to vote. Every barrier to registration, every additional hoop that must be jumped through in order to cast a ballot, actively discourages people from participating in democracy. Low voter turnout is a real problem in our society. Illegal votes from non-citizens are a hypothetical bugaboo.

The National Voter Registration Act protects American voters' right to vote upon supplying the "minimum amount of information necessary." This federal law represents Congress's reasoned opinion that the government should be encouraging citizens to register and to vote, not erecting barriers to democracy. The 10th Circuit found that "the minimum amount necessary" does not include specific documentary proof of citizenship at the time of registration.

The 10<sup>th</sup> Circuit noted that the Kansas government had been unable to show any significant problems with non-citizens attempting to vote. The 10<sup>th</sup> Circuit did, however, find that there is an actual threat of "irreparable harm" from enforcing the documentation requirement for registration in that at least 18,000 Kansans had registered to vote on the "federal form" rather than registering on the state form and providing specific documentation of citizenship. The fact that not one of these 18,000 federally registered voters has been shown to be a non-citizen should tell us something: The risk of disenfranchising voters and discouraging citizens from taking the trouble to vote in elections is far greater than the possibility that a non-citizen would-be voter will slip through the cracks.

I believe that the 18,000 number is a bare minimum in terms of citizens whose desire to vote will be thwarted by this requirement. Remember, these 18,000 Kansans were those who had already registered to vote using the "federal form" rather than following the statutorily required proof of citizenship method. Who knows how many people were dissuaded by the SAFE Act requirements from even attempting to register before the 10<sup>th</sup> Circuit ruled that this documentation requirement was illegal under federal law. The October 21st ruling came too late for anyone not already registered to vote in the 2016 election because the Kansas voter registration deadline for the November 8th election was on October 18th.

The right to vote is a fundamental Constitutional right. The proposed legislation has an actual and significant negative impact on real citizens of Kansas and their exercise of this fundamental right. I urge you to vote "no" on the proposed legislation.

Thank you.

Andrea J. Boyack