

**CONFERENCE COMMITTEE REPORT BRIEF  
SENATE SUBSTITUTE FOR HOUSE BILL NO. 2138**

As Agreed to March 31, 2022

**Brief\***

Senate Sub. for HB 2138 would amend and create law pertaining to elections and voting, including voter registration, election audits, distinctive watermarks on paper ballots, electronic or electromechanical voting systems, electronic poll books, an affidavit system for transferring ballots, duties of the Secretary of State (Secretary) and election officials, electronic poll book fraud, exemptions from election crimes for poll workers, and providing electronic election results.

***Affidavit System***

The bill would require the Secretary, in consultation with county election officers, to develop an affidavit system to be utilized for the transfer of ballots. The bill would require each person who handles ballots to sign an affidavit listing, if applicable, the:

- Number of blank ballots;
- Number of spoiled ballots;
- Number of provisional ballots;
- Number of counted ballots;
- Number of advanced ballots in envelopes;
- Name of the person to whom such ballots were delivered; and
- Location of where the ballots were delivered.

The affidavit system developed by the bill would apply to all ballots received, handled, and collected by county election offices prior to, on, and after the date of an election. The affidavit system would operate in conjunction with statutory provisions regarding transporting, preserving, and destroying ballots and election records.

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\*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kIRD>

Violations of the bill would include altering any information provided in an affidavit or providing false information in an affidavit with the intent to hinder, prevent, or defeat a fair election. Such violations would constitute a severity level 9 nonperson felony. [Note: The provisions of the bill related to affidavits are substantially similar to those of SB 390, as amended by the Senate Committee on Federal and State Affairs.]

### ***Biannual Elections Audit***

The bill would create an election audit procedure to be conducted by the Secretary in the calendar year following the general election of an even-numbered year.

The Secretary would select four counties at random to be audited under the bill, pursuant to the following:

- One county would be required to have a voting-age population of more than 90,000;
- One county would be required to have a voting-age population of more than 20,000 but less than 90,000; and
- Two counties would be required to have voting-age populations of less than 20,000.

The bill would specify that voting-age populations shall be set by the most recent federal decennial census.

The bill would require the Secretary to adopt rules and regulations necessary to implement the audits, including specifying the specific records and procedures to be examined.

### ***Watermarks***

The bill would require all voting systems in Kansas to use a paper ballot with a distinctive watermark as established by the Secretary, for elections on and after January 1, 2024.

The bill would require the ballot to be:

- Marked by the voter, or person assisting the voter as permitted by law, by hand or by use of a voting machine that is a non-tabulating paper ballot marking or printing device;
- Subject to inspection and verification by the voter after marking and before the vote is cast and counted; and
- Canvassed by hand or by vote-tabulating equipment.

The bill would require the voting system to provide the voter an opportunity to correct any error on the paper ballot before it is secured and preserved.

The bill would prohibit a voting system from preserving paper ballots in a manner that would associate a voter with the record of their vote without the voter's consent.

The bill would require the paper ballot to be preserved and constitute the official ballot for audit and recount purposes. The bill would require each paper ballot be counted by hand in a recount unless the recount requestor elects not to have the ballots counted by hand. In the event of any inconsistencies in vote tallies, the vote tallies of the paper ballots counted by hand would be the true and correct record of votes cast.

The bill would prohibit the use of poll books not requiring a hand-written signature.

The bill would require the Secretary to adopt rules and regulations to implement the bill by January 1, 2023.

### ***Exemptions from Certain Election Crimes for Poll Workers***

#### ***Assisting Voters in Marking or Signing Advanced Voting Ballots***

The bill would amend current law to specify a county election officers assisting voters as part of the duties of their office would not be a violation of the bill. The bill would also add an exemption for candidates for office employed by a county election office and who are assisting voters in marking or signing such voters' advance voting ballots. The exemption would not apply to such candidates for office employed by a county election office who appear as a candidate for office on the advance voting ballot for which the candidate is providing assistance.

#### ***Candidate for Office***

In regard to exemptions for poll workers, the bill would define "candidate for office" to mean an individual who has declared such individual's candidacy pursuant to provisions pertaining to primary elections, ballots, and procedures (KSA 25-205 *et seq.*) or has been nominated for elected office pursuant to provisions governing independent nominations, terms of office (KSA 25-301 *et seq.*) in the election for which the voter applied for an advance ballot. This definition would apply to candidates for office who transmit advance voting ballots on behalf of other voters.

### ***Confirmation Notices***

The bill would allow a county election officer to remove a registered voter from the registration list if such registrant has had no election-related activity for any four-calendar-year period and the confirmation notice sent by the county election officer is returned as undeliverable.

Under current law, a county election officer must send a confirmation notice to a registrant within 45 days of the following events:

- A notice of disposition of a voter registration application is returned as undeliverable;
- Change of address information identifies a registrant whose address may have changed; or

- The U.S. Postal Service provides information that a registrant has moved to a different address inside or outside the registrant’s current county of registration.

The bill would define “no election related activity” to mean such registrant has not voted, attempted to vote, requested or submitted an advance ballot application, filed an updated voter registration card, signed a petition required by law to be verified by the county election officer or the Secretary, or responded to any official election mailing transmitted by the county election office.

***Crime of Electioneering***

The bill would add exemptions from the crime of electioneering for:

- Any county election officer (under continuing law, this exemption also applies to the Secretary and election officials);
- A candidate for precinct committeeman or committeewoman who is
  - Employed by a county election office; and
  - Engaged in the performance of such employee’s duties; and
- A candidate for any office, not including candidates for Secretary of State, any election official or any county election officer, or precinct committeeman or committeewoman, who is:
  - Employed by a county election office;
  - Engaged in the performance of such employee’s duties; and
  - Not appearing as a candidate for office on any ballot such employee touches, handles, distributes, or counts.

In regard to electioneering, the bill would define “candidate” to mean an individual who has declared their candidacy or as been nominated for elected office in the election for which the individual is charged with having violated the electioneering provisions of the bill.

***Audit of Elections Within One Percent***

Current law requires that in order for an election to be certified, a manual audit or tally of each vote cast in an election, regardless of voting method, in one percent of all precincts, with a minimum of one randomly selected precinct per county, must be conducted by a sworn election board.

The bill would amend current law to require such an audit to be conducted in any even-numbered year federal, statewide, or state legislative race where the margin of victory is within one percent. The county election officer would be required to audit ten percent of all county precincts, with a minimum of one precinct, in the same manner as existing audit requirements. The precincts audited would be in addition to precincts audited under existing law.

### ***Canvass Abstracts Available for Review***

The bill would require, upon the publication of the notice of the time and location of the audit required by the bill, that the abstracts of original canvass be made available for review by authorized poll agents. The bill would require the abstracts from all precincts to be made available for review, not just those precincts subject to the audit.

[*Note:* Under current law, a county election board, upon completion of its canvass, makes and certifies abstracts of the votes cast for each precinct and each voting machine.]

### ***Elections Results—State Board of Canvassers***

The bill would also require each county election officer to provide precinct-level election results electronically in machine-readable format for all federal offices, statewide offices, legislative offices, and local offices not later than 30 days after the final canvass of general election results.

### ***Electronic Poll Books***

#### ***Definition***

The bill would define “electronic poll book” as a list of registered voters for a particular precinct or polling location that may be transported to a polling location and on which each voter may sign their signature. The bill would clarify “electronic poll book” would not include automatic tabulating equipment or data processing equipment, including a direct recording electronic system, that are components of an electronic or electromechanical voting system.

#### ***Board of County Commissioners and County Election Officer Provisions***

The bill would permit a board of county commissioners (board) and county election officer (officer) to provide electronic poll books to be used at voting places, or for advance voting, at national, state, county, township, city, and school primary and general elections and in question submitted elections. Such board and officer would be permitted to issue bonds to finance and pay for the purchase, lease, or rental of such electronic poll books. Such board and officer would be permitted to adopt, experiment with, or abandon any electronic poll book authorized for use in the state. If the Secretary rescinds approval of any electronic poll book, the board and officer would be required to abandon such electronic poll book until changes required by the Secretary are made; if such changes cannot be made, the abandonment would be permanent.

#### ***Prohibitions***

The bill would prohibit, beginning July 1, 2022, the board and officer from purchasing, leasing, or renting any electronic poll book, unless such poll book has been certified by the Secretary. The bill would also prohibit the operation of any electronic poll book with network connectivity that does not meet security standards established by the Secretary.

### *Secretary of State Responsibilities*

The bill would require the Secretary to examine and approve the kinds or makes of electronic poll books; no kind or make of electronic poll book would be permitted to be used at any election until it receives certification by the Secretary.

### *Sale of Electronic Poll Books*

The bill would permit any person, firm, or corporation that desires to sell electronic poll books to political subdivisions in the state to request in writing for the Secretary to examine such poll books. The bill would require any such written request to include a certified check for \$250 to defray costs for the Secretary to provide the examination. [Note: Such examination would follow the guidelines for examination of electronic or electromechanical voting systems currently in KSA 25-4405.]

### ***Electronic or Electromechanical Voting Systems***

The bill would require that any electronic or electromagnetic voting system approved by the Secretary shall not have the capability, or any component thereof shall not have the capability of, connecting to the internet or any other communications or computer network. The bill would specify such networks include, but are not limited to, a local area network, wireless network, cellular network or satellite network, or the use of Bluetooth or any other wireless communications technology.

### ***Use of Electronic Poll Books and Electronic or Electromechanical Voting Systems***

The bill would require the board and officer to provide the number of units of electronic or electromechanical voting systems or electronic poll books as necessary to equip voting places, if such board and officer have determined a kind or make of such voting systems or poll books shall be used in the county.

If the Secretary has rescinded the approval of any electronic poll book, the bill would prohibit any tax from being levied, or any moneys being paid from any fund, for the purchase, lease, or rent or such poll book. [Note: This prohibition exists in KSA 25-4407 for electronic or electromechanical voting systems.]

The bill would require the board to provide for the storage of such electronic poll books, and would require the officer to be in complete charge of the safekeeping, repair, and delivery of such poll books. The bill would require the officer to see that such poll books are returned to their storage after any election. [Note: These requirements currently exist in KSA 25-4408 for electronic or electromechanical voting systems.]

The bill would require election judges before, during, and after the operation of the polling place, to make all electronic or electromechanical voting systems and vote tabulating equipment available to any candidate or any authorized poll agent for review to ensure there is no connectivity to the internet or to any other communications or computer network.

### ***Testing of Vote Tabulation Equipment***

Current law requires officers to have testing conducted of automatic tabulating equipment within five days prior to the date of an election. The bill would require public notice of such test to be published on the county website, if the county has a website.

The bill would amend current law requiring such testing to be repeated after the completion of the canvass to require such repeat testing to be conducted within five business days after the completion of the canvass.

### ***Electronic Poll Book Fraud***

The bill would expand the current crime of electronic or electromechanical voting system fraud to include electronic poll book fraud, which would constitute:

- Being in unlawful or unauthorized possession of electronic poll books; or
- Intentionally tampering with, altering, disarranging, defacing, impairing, or destroying any electronic poll book, or component thereof.

Electronic poll book fraud would be a severity level 9 nonperson felony.

### ***Optical Scanning Equipment***

Current law requires officers to have testing conducted of optical scanning equipment within five days prior to the date of an election. The bill would require public notice of such test to be published on the county website, if the county has a website.

The bill would amend current law requiring such testing to be repeated after the completion of the canvass to require such repeat testing to be conducted within five business days after the completion of the canvass.

The bill would prohibit any optical scanning equipment and systems using optical scanning equipment approved by the Secretary from having the capability of, or any component having the capability of, being connected to the internet or any other communications or computer network, including a local area network, wireless network, cellular network, satellite network, or using Bluetooth or any other wireless communications technology.

### ***Technical Changes to Election Audit Statute***

The bill would also make technical changes to ensure consistency in statutory phrasing and to remove an outdated reference to the effective date of the election audit statute.

### ***Conference Committee Action***

The Conference Committee agreed to remove the contents of Senate Sub. for HB 2138 and insert the provisions of SB 439, as amended by the Senate Committee of the Whole,

regarding county election officers sending confirmation notices to registered voters who have had no election-related activity for any four-calendar-year period.

The Conference Committee further agreed to add the provisions of SB 438, as amended by the Senate Committee of the Whole, concerning election audits.

The Conference Committee agreed to add the provisions of SB 389, as amended by the Senate Committee on Federal and State Affairs, concerning voting systems using paper ballots with distinctive watermarks. The Conference Committee agreed to further amend the provisions of SB 389 by removing the requirement that the election board conduct a sample hand-counted audit of paper ballots if paper ballots are read and tabulated by vote-tabulating equipment.

The Conference Committee further agreed to add the provisions of HB 2565, as introduced, concerning the requirement that county election officials provide precinct-level election results electronically in a machine-readable format for all federal offices, statewide offices, legislative offices, and local offices not later than 30 days after the final canvass of general election results.

The Conference Committee further agreed to add the provisions of SB 351, as amended by the Senate Committee of the Whole, regarding electronic poll books, electronic or electromechanical voting systems, post-election equipment testing, electronic poll book fraud, and the transfer of ballots by election workers and the development an affidavit system to be utilized for such ballot transfers.

The Conference Committee further agreed to amend the bill to exempt poll workers from certain election crimes.

[*Note:* The contents of Senate Sub. for HB 2138 were added to HB 2137 during the 2021 Legislative Session.]

## **Background**

The Conference Committee replaced the contents of Senate Sub. for HB 2138 with SB 439, as amended by the Senate Committee of the Whole; SB 438, as amended by the Senate Committee of the Whole; SB 389, as amended by the Conference Committee; HB 2565, as introduced; and SB 351, as amended by the Senate Committee of the Whole. The Conference Committee further agreed to add provisions regarding election crime exemptions for poll workers.

### ***SB 439 (Confirmation Notices Regarding Election-related Activity)***

The bill was introduced by the Senate Committee on Judiciary at the request of Senator Warren on behalf of the Office of the Secretary of State.

[*Note:* The provisions of the bill, as introduced, were similar to the provisions of HB 2555, as recommended by the House Committee on Elections]

### *Senate Committee on Federal and State Affairs*

In the Senate Committee hearing, a representative of the Office of the Secretary of State provided **proponent** testimony, stating that the bill would add a fifth reason for the county election officer to send a confirmation notice to a voter's address and would help with ongoing voter roll maintenance.

Representatives of the ACLU of Kansas, the Disability Rights Center of Kansas, the League of Women Voters of Kansas, and Loud Light Civic Action provided **opponent** testimony. Opponents generally expressed concerns about registered voters being removed from voter rolls and the impact on minorities, young voters, and individuals with disabilities. Written-only opponent testimony was provided by a representative of the Kansas Appleseed Center for Law and Justice.

Written-only neutral testimony was provided by a representative of the Kansas County Clerks and Election Officials Association.

### *Senate Committee of the Whole*

The Senate Committee of the Whole amended the bill to allow a county election office to remove a registered voter from the voter registration list if the voter had no election-related activity for any four-year period or fails to respond to a confirmation notice sent by a county election officer. [*Note: The amendment was not retained by the Conference Committee.*]

### ***SB 438 (Election Audits)***

The bill was introduced by the Senate Committee on Federal and State Affairs at the request of Senator Warren on behalf of the Secretary.

[*Note: The bill contains provisions similar to those of HB 2570, as introduced.*]

### *Senate Committee on Federal and State Affairs*

In the Senate Committee hearing, **proponent** testimony was provided by a representative of the Secretary. The proponent stated there is a constant need to improve and enhance the election audit process, and local election officials were involved in the development of this legislation to ensure unattainable mandates would not be imposed.

Neutral testimony was provided by a representative of Loud Light Civic Action and a private citizen, indicating the bill would lack procedural specificity and expand the traditional audit procedure, rather than utilizing alternative audit procedures that can provide greater overall certainty. A representative of the Kansas County Clerks and Election Officials Association provided written-only neutral testimony.

No other testimony was provided.

The Senate Committee amended the bill to require county election offices to make certified official abstracts available for review by authorized poll agents. [Note: The amendment was retained by the Conference Committee.]

#### *Senate Committee of the Whole*

On March 22, 2022, the Senate Committee of the Whole amended the bill to remove the requirement that a county could not be selected for audit if it had been selected in the three most recent audit cycles. [Note: The amendment was retained by the Conference Committee.]

#### ***SB 389 (Paper Ballots with Distinctive Watermarks)***

The bill was introduced by Senator Hilderbrand.

#### *Senate Committee on Federal and State Affairs*

In the Senate Committee hearing, Senator Hilderbrand and a private citizen provided **proponent** testimony, stating that the bill would increase public trust in the validity of elections. Written-only proponent testimony was provided by a representative of Opportunity Solutions Project and four private citizens.

Representatives of the Secretary and the Kansas Association of Counties provided neutral testimony, indicating technical concerns with the bill. Written-only neutral testimony was provided by a private citizen.

**Opponent** testimony on the bill was provided by representatives of the Disability Rights Center of Kansas and Loud Light Civic Action, indicating concerns for individuals with disabilities and the cost to county election offices. Written-only opponent testimony was provided by Senator Sykes, representatives of the Kansas County Clerks and Election Officials Association and Wichita NAACP, and a private citizen.

The Senate Committee amended the bill to require the Secretary to adopt rules and regulations by January 1, 2023, and to delay implementation of the watermark requirement until January 1, 2024. [Note: The amendments were retained by the Conference Committee.]

#### ***HB 2565 (Providing Electronic Election Results)***

The bill was introduced by the Committee on Federal and State Affairs at the request of Representative Howell.

#### *House Committee on Federal and State Affairs*

In the House Committee hearing, **proponent** testimony was provided by a Sedgwick County Commissioner, who stated the requirement would ensure data are available in a usable format. Written-only proponent testimony was provided by a private citizen.

A representative of the Secretary provided neutral testimony. No other testimony was provided.

[*Note:* The House Committee added the provisions of HB 2565 to HB 2715.]

### ***SB 351 (Electronic Poll Books)***

The bill was introduced by the Senate Committee on Federal and State Affairs at the request of Senator Bowers.

#### *Senate Committee on Federal and State Affairs*

In the Senate Committee hearing, a representative of the Office of the Secretary of State provided **proponent** testimony, generally stating the need for the Secretary to regulate and certify electronic poll books. Three private citizens provided written-only proponent testimony.

A representative of the Kansas County Clerks and Election Officials Association who is also the Harvey County Clerk provided neutral testimony.

Written-only opponent testimony was provided by a private citizen.

The Senate Committee amended the bill to:

- Remove a requirement for election judges to ensure that no component of an electronic or electromechanical voting system is connected to the internet or other communications or computer network; and
- Require election judges make all electronic or electromechanical voting systems and vote tabulating equipment available to any candidate or any authorized poll agent for review.

[*Note:* Both amendments were retained by the Conference Committee.]

#### *Senate Committee of the Whole*

The Senate Committee of the Whole amended the bill to insert provisions requiring the Secretary to develop an affidavit system for persons transferring ballots. [*Note:* These provisions were passed by the Senate in SB 390. Further information on this bill appears below.]

### ***SB 390 (Affidavit System)***

The bill was introduced by Senator Hilderbrand.

## *Senate Committee on Federal and State Affairs*

In the Senate Committee hearing, Senator Hilderbrand provided **proponent** testimony, stating the bill was a result of his experience as a county commissioner, and that the bill would address concerns about ballot chain of custody.

Written-only proponent testimony was provided by three private citizens.

A representative of the Office of the Secretary of State provided neutral testimony, stating the bill would give the agency the ability to harmonize chain of custody policies, and indicating concern with having the system in place by the effective date.

Written-only **opponent** testimony was provided by a private citizen.

The Senate Committee amended the bill to:

- Replace references to “local election officers” with “county election officers”;
- Specify that each person who handles ballots for a county election office would be required to sign the affidavit;
- Add the number of counted ballots to the list of items required on the affidavit;
- Specify the affidavit system would apply to all ballots received, handled, and collected by county election offices prior to, on, and after the date of an election;
- Provide the affidavit system would operate in conjunction with statutory provisions regarding transporting, preserving, and destroying ballots and election records;
- Define violations of the bill and penalty for violation; and
- Make technical changes.

[*Note:* The amendments were retained by the Conference Committee.]

## **Fiscal Information**

### ***SB 439 (Confirmation Notices Regarding Election-related Activity)***

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Office of the Secretary of State (Office) indicates costs associated with enactment of the bill could be absorbed within existing resources. The Kansas Association of Counties (KAC) indicates enactment of the bill would increase costs for counties related to postage and labor, but such costs would vary by each county’s population and the number of personnel and supplies required. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2023 Governor’s Budget Report*.

### ***SB 438 (Election Audits)***

According to the fiscal note prepared by the Division of the Budget on the bill, as introduced, the Secretary indicates the bill would have no fiscal effect on the Office. The bill would require the agency to develop training, education, documentation, and implementation of the new audit process.

The KAC indicates the bill would increase labor costs necessary for conducting the additional audits. The costs associated with the audits are unknown as they would vary depending on how many personnel are necessary to conduct the audits based upon each county's population size.

### ***SB 389 (Paper Ballots with Distinctive Watermarks)***

According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Office indicates it would incur costs for staff time, but these costs could be absorbed within existing resources.

Both the Office and the KAC indicate enactment of the bill would significantly increase expenditures for counties and local county election offices related to:

- Equipment upgrades for voting machine vendors and ballot printing vendors to have the capability to produce watermarked ballots;
- Hand recounts; and
- Additional wages paid to election board workers who would be required to conduct sample random audits.

The exact impact for each county would depend on the county's population and equipment replacement needs. Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2023 Governor's Budget Report*.

### ***HB 2565 (Providing Electronic Election Results)***

According to the fiscal note prepared by the Division of the Budget on HB 2565, the Office indicates it is unclear whether the provisions would cause local election offices to upgrade current voting systems to meet the requirements. The KAC indicates enactment of these provisions could increase training costs for county election offices, but the amount would vary by county, depending on the number of personnel involved.

### ***SB 351 (Electronic Poll Books)***

According to the fiscal note prepared by the Division of the Budget on SB 351 as introduced, the Office estimates any fiscal effect on expenditures from the enactment of the bill would be negligible and could be absorbed within existing resources. The Office estimates the bill could increase its annual revenues by approximately \$2,000 from the requirement to certify electronic poll books.

The Office indicates enactment of the bill would require local law enforcement and county prosecutors to investigate and prosecute electronic poll book fraud, and it is unclear if there would be any fiscal effect for those entities. The KAC indicates a county's cost to purchase equipment required by the bill could be significant, but would depend on the population of the county and how much equipment is needed.

### ***SB 390 (Affidavit System)***

According to the fiscal note prepared by the Division of the Budget on SB 390 as introduced, the KAC states enactment of the bill could slightly increase costs necessary for administering the affidavit signature requirements. The exact costs would vary depending on how many personnel are necessary to oversee the election process appropriate for each county's population size. The KAC cannot estimate the fiscal effect.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2023 Governor's Budget Report*.

Elections; voter registration; audits; affidavit system; election procedures; abstracts; poll agents; watermark; voting systems; electronic poll books; ballot transfer; Secretary of State

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