

Kansas State Legislature Special Committee on Elections

September 28, 2023

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Opportunity Solutions Project

Chair Thompson, Vice Chair Proctor, and honorable members of the committee,

Good morning, my name is Madeline Malisa, and this is my colleague Stewart Whitson, and we are visiting fellows at the Opportunity Solutions Project (OSP). OSP is a non-profit, non-partisan advocacy organization. We work in more than 40 states across the country with one clear goal—to help more people achieve the American Dream. We appreciate the opportunity to speak before your committee today.

The U.S. Constitution delegates the job of determining the time, place, and manner of Kansas elections to you the state legislature—not to the governor or bureaucrats from Washington D.C. Today, we will walk you through two recent examples of how your constitutional authority has been circumvented and make recommendations on ways you can hold the executive branches—both here in Topeka and D.C. accountable.

I know many of you are aware of Governor Kelly's election scandal, which started back in 2019. But I'd like to refresh your memory by reviewing the facts. Back in November 2019, the governor met with a coalition of groups including Loud Light, the ACLU, and Demos. ¹

The groups informed her they would be bringing a lawsuit against the state alleging violations of the National Voter Registration Act. The lawsuit was never filed because the governor unilaterally signed a legally binding settlement agreement to implement their demands. This agreement was signed with no input or approval from the legislature. To date, no copy of the settlement agreement has been released to the legislature or to the public.

As a result, the Kansas Department of Children and Families and the Kansas Department of Health and Environment sent out more than 277,000 voter registration forms. As you are aware, these two agencies oversee food stamps, Medicaid, and other welfare programs. The forms were mailed sometime between November 2019 and November 2020, when Kansans voted for the presidency, the U.S. Senate, four U.S. House races, and a wide variety of state positions.²

In September 2021, nearly two years after that first meeting, and after the consent decree was signed, the legislature was first alerted to this settlement deal because Demos, one of the groups the governor met with privately, issued a press release about it.³ If Demos had

¹ "Governor Laura Kelly Announces Expanded Voter Registration Opportunities for Kansans," Office of the Governor (October 1, 2021), https://governor.kansas.gov/governor-laura-kelly-announces-expanded-voter-registration-opportunities-for-kansans/. Attached hereto as Exhibit 1.

² Voting Rights Coalition Comes to Agreement with Kansas to Expand Opportunities for Voter Registration," Demos (September 30, 2021), https://www.demos.org/press-release/voting-rights-coalition-comes-agreement-kansas-expand-opportunities-voter. Attached hereto as Exhibit 1.

³ "Governor Laura Kelly Announces Expanded Voter Registration Opportunities for Kansans," Office of the Governor (October 1, 2021), https://governor.kansas.gov/governor-laura-kelly-announces-expanded-voter-registration-opportunities-for-kansans/. Attached hereto as Exhibit 1.

not released this information, this settlement deal would have likely remained a secret. In its press release, Demos praised its careful negotiation process with Governor Kelly. The very next day and for the first time, Governor Kelly then issued her own press release, which mirrored the Demos press release. Her office noted that they had "worked closely with Kansas voting rights advocacy non-profit Loud Light, who was represented by think tank Demos, the American Civil Liberties Union (ACLU) of Kansas, and the ACLU's national Voting Rights Project."

The legislature started asking questions such as: What gives a governor the right to change the state's election practices without the legislature's input? Why did the governor only acknowledge the settlement after Demos made it public? If this deal was about keeping Kansas in compliance with the National Voting Rights Act (NVRA), why was there total secrecy? Why did the governor only send voter registrations to people receiving public assistance and not other groups of voters?

Kansas election law and procedures should not be subject to changes made behind closed doors, or in backroom dealings by a governor or a bureaucrat. Instead, changes to the election laws of this state should be made by this legislature, as provided by the U.S. Constitution, through the democratic process.

In April 2021, after answers didn't materialize, the legislature passed HB 2252, which prohibits a governor and other executive branch officials from entering into a consent decree or other agreement with any party regarding the enforcement of election laws or the alteration of any election procedure without specific approval by the legislature.⁶

In response, Governor Kelly vetoed the bill saying "there are times when it is necessary or actually better" to enter into these agreements. But with your legislative override of her veto, no Kansas governor will be able to use secret consent decrees to change election laws again.⁷

However, Demos is now using the same playbook at the federal level—here in Kansas and across the country. And Governor Kelly is once again executing their plan. I'm going to turn it over to Stewart to discuss President Biden's federal executive order and the implications it has for Kansas elections.

So, who is Demos? Demos is a well-funded, left-wing group that wants to control elections in conservative states by writing the rules they must follow. Obviously, the Left failed at the

⁴ Voting Rights Coalition Comes to Agreement with Kansas to Expand Opportunities for Voter Registration," Demos (September 30, 2021), https://www.demos.org/press-release/voting-rights-coalition-comes-agreement-kansas-expand-opportunities-voter. Attached hereto as Exhibit 1.

Ibid.

 $^{^{6}}$ KS H.B. 2252 (2021). Attached hereto as Exhibit 2.

⁷ Governor Kelly's veto message for KS H.B. 2252 (2021).

start of the Biden administration to get federal legislation passed to do this, so they have now directed their attention to instead forcing their policy upon the states through the power of the executive branch.⁸ This is happening at both the federal and the state level, especially in states like Kansas. Here in Kansas, these groups and the Biden administration have found a strong ally in Governor Kelly, who has shown a repeated willingness to quietly do their bidding through secretive backroom deals. These deals are hidden from the public as well as this legislature, until they are disclosed by others, months or even years after the secret deal has been made.⁹⁻¹⁰⁻¹¹

Demos matters because Bidenbucks, or Executive Order 14019, which I'll talk about more in a moment, was not dreamed up by the Biden administration. It was dreamed up by Demos, and then two of its senior leaders (the President of Demos, and its Director of Legal Strategies) were both hired by the White House and placed into key roles to help carry out the plan they created.¹²

So, why is this important? It's important because it means that even in the face of excessive stonewalling and a complete lack of transparency from the Biden administration, we can still get a pretty good idea of the *true* aims of this Order by studying the plan which the Executive Order is based on—the plan created by Demos. And when we study the Demos plan and see Demos calling on the Biden administration to quote, "[i]ssue an executive order directing federal agencies serving under-registered populations to provide voter registration services," and to build a new Department of Justice Civil Rights Division that is "fully staffed by political appointees" to "pursue aggressive civil and criminal enforcement of federal voting rights protections," we can surmise that this order isn't about increasing voter turnout for *all* voters, equally. No. This is a *targeted* get-out-the-vote scheme designed by the Left to benefit the Left, all paid for on the backs of federal taxpayers.

Obviously, for the people of Kansas, Demos' involvement in Biden's executive order should be even more unsettling as Demos is the same group that was at the center of the Governor Kelly election scandal my colleague, Madeline just told you about.

⁸ "Presidential Executive Order 14019, Promoting Access to Voting," Federal Register, National Archives (March 7, 2021), https://www.federalregister.gov/documents/2021/03/10/2021-05087/promoting-access-to-voting. Attached hereto as Exhibit 3.

⁹ "Voting Rights Coalition Comes to Agreement with Kansas to Expand Opportunities for Voter Registration," Demos (September 30, 2021), https://www.demos.org/press-release/voting-rights-coalition-comes-agreement-kansas-expand-opportunities-voter.

¹⁰ "Governor Laura Kelly Announces Expanded Voter Registration Opportunities for Kansans," Office of the Governor (October 1, 2021), https://governor.kansas.gov/governor-laura-kelly-announces-expanded-voter-registration-opportunities-for-kansans/.

¹¹ Stewart Whitson, "An election Scandal in Kansas May Be Underway in Other States," The American Spectator (June 14, 2022), https://spectator.org/election-scandal-kansas-laura-kelly/.

¹² Stewart Whitson, "Biden's Unlawful Plan to Federalize Elections," The American Spectator (October 22, 2021), https://spectator.org/bidens-unlawful-plan-to-federalize-elections/.

¹³ "Executive Action to Advance Democracy: What the Biden-Harris Administration and the Agencies Can Do to Build a More Inclusive Democracy," Demos (December 3, 2020), https://www.demos.org/policy-briefs/executive-action-advance-democracy-what-biden-harris-administration-and-agencies-can. Attached hereto as Exhibit 4.

Let's walk through a quick timeline together.

In December 2020, Demos published a policy paper outlining a strategy for President Biden to use executive power to take over elections nationwide.¹⁴ Later, Demos bragged on their website about lobbying the Biden administration to get their plan adopted.¹⁵

In January 2021, Demos President K. Sabeel Rahman was named Senior Counselor at OIRA (the Office of Information and Regulatory Affairs). ¹⁶ Importantly, OIRA is the organization that provides a legal review of all presidential executive orders before they are released to make sure they comply with federal law and the Constitution.

In other words, if you're looking to pass an executive order (like the one we're talking about today) that is constitutionally and ethically questionable, this is a key post to fill with someone who supports that EO. Who better than the President of Demos?

And in March 2021, Demos Director of Legal Strategies Chiraag Bains was named Special Assistant to the President.¹⁷ Bains, a longtime left-wing activist, reported directly to the president's domestic policy advisor which Biden's EO tasked with overseeing this effort. Days after Bains was hired by the White House, the Executive Order went out. Within hours of publishing the EO, Demos had press releases and statements out to the media that were clearly teed up beforehand, announcing how excited Demos was to continue working with Biden on this effort.¹⁸ Bains quietly left the administration in or about March 2023 after the order was fully implemented at the federal level.

So, we call this scheme "Bidenbucks" because it is Zuckerbucks on steroids. Instead of Mark Zuckerberg, it's Joe Biden, and instead of \$400 million dollars, it is the unlimited power, resources, and reach of the federal government and its offices in states across the country.

So what does Biden's order do? The order commands the head of every federal agency to develop a plan to do two things, promote voter registration and promote voter participation.¹⁹

¹⁴ Ibid.

¹⁵ Adam Lioz, "Biden's Executive Order Promoting Voter Registration Through Federal Agencies Could Help Millions of Potential Voters," Demos (March 7, 2021), https://www.demos.org/blog/bidens-executive-order-promoting-voter-registration-through-federal-agencies-could-help.

¹⁶ Stewart Whitson, "Biden's Unlawful Plan to Federalize Elections," The American Spectator (October 22, 2021), https://spectator.org/bidens-unlawful-plan-to-federalize-elections/.

¹⁸ Demos Applauds Biden's Executive Order Aimed at Facilitating Voter Registration, Urges Strong Follow-Through, Demos (Mach 7, 2021), https://www.prnewswire.com/news-releases/demos-applauds-bidens-executive-order-aimed-at-facilitating-voter-registration-urges-strong-follow-through-301241983.html.

¹⁹ "Presidential Executive Order 14019, Promoting Access to Voting," Federal Register, National Archives (March 7, 2021), https://www.federalregister.gov/documents/2021/03/10/2021-05087/promoting-access-to-voting.

The order also commands all federal agencies to solicit and support "approved" third-party organizations to allow them to use federal resources to register and mobilize the voters these groups target, and to do so on federal property located in every state.²⁰ To date the Biden administration has aggressively fought to avoid disclosing the names of the handselected third-party groups it's working with behind closed doors to conduct this targeted voter registration effort. However, earlier this summer, one federal agency, Indian Health Services (IHS), disclosed in an email to Daily Signal journalist Fred Lucas that it was working with four specific groups in furtherance of Biden's executive order.²¹ Those groups, and there are only four of them, include the National Congress of American Indians, the Native American Rights Fund, the ACLU, and, you guessed it, Demos. And what makes this limited disclosure even more troubling is that IHS's initial response to Mr. Lucas's FOIA request was that "a thorough search" of its files did not reveal a record responsive to his request. It was only after the reporter asked for an on-the-record comment from IHS, that a member in the public affairs office let slip the truth, that Demos is continuing to advance this effort behind closed doors in direct coordination with federal agencies led by the current president's political appointees.

Obviously, with a highly partisan president and zero transparency, the concern with this "Bidenbucks" executive order is that federal resources are being used to engage in *targeted* voter mobilization efforts designed to benefit the Left. Again, this is Zuckerbucks on steroids, except that it's not being funded by left-wing billionaires like Mark Zuckerberg, instead, it's being funded by American taxpayers.

Here's some of what we know so far.

The U.S. Department of Health and Human Services (HHS) is turning more than 1,400 federally qualified health centers located across the country into voter registration hubs. ²² Under the authority of this executive order new guidance has been issued authorizing federally qualified health centers to support voter registration efforts by third-party groups hand-selected by the administration, including by making materials such as posters, brochures, and voter registration forms created by these third-party groups available to health center patients. The guidance also encourages these health centers to participate in voter registration community events by providing basic health assessments and screenings to help attract crowds to the event. In other words, these third-party groups are collaborating with these federally qualified health centers to target specific groups of voters and using federally funded benefits to lure targeted groups of voters to registration events sponsored by these left-wing groups.

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²¹ Fred Lucas, "Demos, ACLU Among 'Voter Advocacy Groups' Helping Federal Agencies Turn Out Vote on Biden's Order," The Daily Signal (June 7, 2023), https://www.dailysignal.com/2023/06/07/exclusive-demos-aclu-among-voter-advocacy-groups-helping-federal-agencies-turn-out-vote-on-bidens-order/.

²² Briefing Room, "Fact sheet: Biden-Harris administration releases report on Native American voting rights," The White House (2022), https://www.whitehouse.gov/ briefing-room/statements-releases/2022/03/24/fact-sheet-biden-harris-administration-releases-report-on-native-american-voting-rights/.

Next, the U.S. Department of Labor (DOL) is turning more than 2,300 American Job Centers into voter registration agencies, allowing third-party groups to engage in voter outreach activities on-site.²³ Which groups? No one knows because the Biden administration has refused to disclose which groups it is approving for this special access, nor has it disclosed the criteria for approval.

The U.S. Department of Agriculture (USDA) will allow food stamp agencies to use administrative funds to pay for voter registration and participation services.²⁴ Not only is the administration ordering agencies to engage in voter turnout activities in new unprecedented ways, it is also finding new ways to divert federal funds to this effort.

In addition, the U.S. Department of Housing and Urban Development (HUD) sent guidance to executive directors of more than 3,000 public housing authorities managing about 1.2 million housing units, advising them on how to run voter registration drives through public housing agencies (PHAs).²⁵ Federal housing officials also advised the local agencies on how to apply to become a "voter registration agency under the National Voter Registration Act," and, get this, how to set up drop boxes for ballots on the premises.

And, in guidance, the Department of Education issued last year to colleges and post-secondary schools, the department encouraged schools to use Federal Work Study funds to pay students supposedly employed directly by the institution, but who, in reality, work under the direction and supervision of third-party groups, to engage in voter registration efforts and other community service activity related to the electoral process, both on and off campus. ²⁶⁻²⁷ Think about that for a second. Federal work-study funds are now being used to pay students to work for certain left-wing voting groups to help them carry out their mission to target left-leaning voters, not just on campus, but off campus as well. The Biden administration is literally giving these groups an army of free workers to advance the mission of these third party organizations (which is the keep the president's politically in power at all costs) all paid for by taxpayers.

²³ Employment and Training Administration, "US Department of Labor issues guidance to states, territories to designate American Job Centers as voter registration agencies," U.S. Department of Labor (2022), https://www.dol.gov/newsroom/releases/eta/eta/20220325.

²⁴ Briefing Room, "Fact sheet: Biden-Harris administration releases report on Native American voting rights," The White House (2022), https://www.whitehouse.gov/ briefing-room/statements-releases/2022/03/24/fact-sheet-biden-harris-administration-releases-report-on-native-american-voting-rights/.

²⁵ Fred Lucas, HUD Pushes Voter Registration Drives in Public Housing Under Biden's Executive Order, The Daily Signal (2022), https://www.dailysignal.com/2022/04/27/hud-pushes-voter-registration-drives-in-public-housing-under-bidens-executive-order/.

²⁶ Requirements for Distribution of Voter Registration Forms, GEN-22-05, U.S. Department of Education (2022), https://fsapartners.ed.gov/knowledge-center/library/dearcolleague-letters/2022-04-21/requirements-distribution-voter-registration-forms.

²⁷ Fact Sheet: Biden-Harris Administration Releases Report on Native American Voting Rights, White House Briefing Room (2022), https://www.whitehouse.gov/briefingroom/statements-releases/2022/03/24/fact-sheet-biden-harris-administration-releases-report-on-native-american-voting-rights/.

And lastly, according to recent guidance issued by the United States Citizenship and Immigration Service (USCIS), whenever state and local election officials are unavailable to attend a citizenship ceremony, federal officials are now required to invite "approved" third-party groups to attend these ceremonies in their place, and get this, not only are these groups allowed to distribute and collect registration applications before and after the ceremonies, but they are actually given the opportunity to speak at the ceremonies and address the entire crowd to introduce themselves and their organization.²⁸ These non-government third-party groups are being given special unfettered access to targeted groups of voters along with the impression that they are somehow sanctioned by the government.

And at the end of the day, what do all of these agencies working so hard to advance the Bidenbucks scheme have in common? They're all agencies that provide benefits directly to individuals that historically tend to vote for the current president's political party. Again, this is targeted voter registration using the power, resources, and reach of the federal executive branch and its offices located in states across the country.

Lastly, it is important to note, that while transparency has been repeatedly denied to government watchdog groups and even to state legislatures and members of Congress, scores of left-wing groups appear to have an inside view on the actions being taken by federal agencies to carry out the Bidenbucks scheme. Using this inside information, a report was recently generated by more than 50 Left-wing groups, including Demos, outlining strategies federal agencies could employ to carry out the Bidenbucks scheme more aggressively than they are currently doing, while applauding some of the efforts already taken to date.²⁹ Why is it so hard for state legislatures and Congress to get answers from the administration, while these third-party groups are given unfettered access and even the opportunity to counsel federal agencies on how to go about carrying out this scheme?

And of course, at the state level, Kansas, under the leadership of Governor Kelly, is, again, leading the charge.

So, under the National Voter Registration Act (NVRA), federal agencies are allowed to serve as NVRA voter registration agencies only if they are designated <u>by the state</u> and only if the agency accepts the designation.³⁰ But in the NVRA's 30 years of existence, never had a state ever designated a federal agency as a voter registration agency under the NVRA, that is, until Kansas supposedly did in or about May 2022, in coordination with the Biden

²⁸ Policy Alert: Access to Voter Registration Services During Naturalization Ceremonies, PA-2023-25, USCIS (August 25, 2023), https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20230825-VoterRegistration.pdf.

²⁹ Strengthening Democracy: A Progress Report on Federal Agency Action to Promote Access to Voting, The Leadership Conference on Civil and Human Rights (2023), https://civilrights.org/wp-

content/uploads/2023/03/ProgressReport_VotingAccess.pdf. Attached hereto as Exhibit 5. $^{\rm 30}$ 52 U.S.C. § 20506.

administration.³¹ It was then that the state of Kansas, according to the White House, designated the Haskell Indian Nations University (HINU) as a voter registration agency under the NVRA.³² Again, this is the first federal program ever designated this way by a state during the NVRA's 30-year existence. So, someone, it's not clear who, formally designated HINU under the NVRA on behalf of the state of Kansas. Given Governor Kelly's past, including her past dealing with Demos and the consent decree scandal, it is obviously reasonable to assume that the designation came under her order.

And the only reason we even know about this designation is because, on September 20, 2022, Biden's Domestic Policy Advisor at the time, Susan Rice, bragged that only two agencies have been designated under the NVRA to implement the Bidenbucks scheme: the Department of Veterans Affairs and HINU.³³ In that same announcement, the White House also admitted that federal agencies are seeking these NVRA designations only "whenever practicable." In other words, only in states where they have partners who will collaborate with the current administration and quietly designate the agencies behind closed doors.

To date, not a single announcement has been made by Governor Kelly or her office related to the designation of HINU or any other federal agency operating in Kansas, yet according to HINU's website, HINU is now actively registering voters.³⁴ The evidence definitely gives the appearance that the governor is up to her old tricks, making unilateral decisions that impact elections across the state of Kansas, in secret, behind closed doors. And these decisions appear to be aimed at turning out only those voters that are more likely to vote for Governor Kelly's political party.

But here's the key, under Kansas law, the governor doesn't have the power to unilaterally designate a federal agency as a voter registration hub under the NVRA. Only the state legislature can do that.³⁵⁻³⁶⁻³⁷ The Kansas Constitution and a law passed last session (KS §25-125(a)-(c)) which prohibits the governor, the secretary of state or any other executive branch officer from entering any agreement with any other party regarding alteration of any election procedure without specific approval from the legislature, make that crystal clear.

However, given the lack of transparency, we cannot say with certainty when exactly it was that the Governor or someone under her control made this secret designation that apparently only HINU and the White House knew about. If challenged, the Governor might

³¹ Briefing Room, How the Biden-Harris Administration is Continuing to Promote Voting Access, The White House (September 20, 2022), bit.ly/3E48TTP. Attached hereto as Exhibit 6.

³² Ibid.

³³ Ibid.

³⁴ Voter Registration, Haskell Indian Nations University (2023), https://www.haskell.edu/consumer-disclosure/index-3/voter_registration/.

³⁵ See 52 U.S.C. § 20506.

³⁶ See Kan. Const. art. IV §1.

³⁷ See KS §25-125(a)-(c).

claim that she somehow snuck through her designation before the law I just mentioned became effective. Yet, even if she did, under Kansas law, it is clear that the governor does not have the authority to designate a federal agency under the NVRA, with or without the new law (though the new law certainly makes it explicitly clear that she does not).

All this to say, the surest way to address this problem is for this legislature to pass a resolution declaring, as null and void, all supposed designations of federal agencies as voter registration agencies under the NVRA, by anyone other than the state legislature, while making it clear that only the state legislature may make such a designation. That would then give this legislature the opportunity to decide for itself whether designating HINU or any other federal agency makes sense. It would also provide future legal recourse were the legislature to discover down the road that the governor or someone else had entered yet another secret deal, unbeknownst to the legislature, which, sadly, probably wouldn't shock anyone in this room at this point.

At the end of the day, this all begs at least two important questions.

First: Why all the secrecy? If Governor Kelly or some other officer of the state decided to unilaterally designate HINU as a voter registration agency under the NVRA for noble reasons, and truly believed she had the legal authority to do so, why didn't she announce it? Why make the designation in secret?

Second: If the person who made the designation of HINU didn't publicly announce it, then how in the world did President Biden's domestic policy advisor get all the details needed for the White House to announce the designation itself?

Think about that for a second. Why is that the White House domestic policy advisor has all the details on which agency "the state" of Kansas has designated under the NVRA including the date when the designation was made, but the Kansas State Legislature does not? That should be unacceptable no matter what political party you happen to belong to.

Reasonable people will look at the facts and wonder whether there is secret coordination going on behind closed doors between Governor Kelly's office and the Biden administration, leaving the state legislature and the people of Kansas completely in the dark. Again, if what they are doing is so noble, why all the secrecy?

Under the U.S. Constitution, responsibility for determining the times, places, and manner of elections falls squarely on the shoulders of the state legislature with limited oversight from Congress, but nowhere is the president (or state governors including Governor Kelly) given this power.³⁸ Yet that is precisely what is happening here. Through this executive order, and through the actions of Governor Kelly or some other officer of the state which

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³⁸ U.S. Const. art. I, § 4, cl. 1.

appear to be completely unlawful based on the facts we have, federal and state executive branches are trying to seize power that belongs exclusively to the legislature. This they cannot do, and it is up to state legislatures, including the Kansas State Legislature and the leaders in this room, to stand up to this unconstitutional power grab, and stop it.

So the final question is (and I promise this is the final question) what can Kansas do about this? Well, there are really three main courses of action.

First, you can, and should pass legislation requiring legislative approval for new federal funding and guidance not explicitly required under existing law.

Second, you should pass legislation along the lines of what I described earlier wherein you declare null and void any designations under the NVRA made by anyone other than the legislature.

Third, this legislature should use its oversight power in coordination with Attorney General Kobach to investigate these scandals and hold the Kelly administration and its accomplices accountable (which probably includes Demos and one or more Kansas-based organizations).

Bottom line, setting aside the illegality of the Bidenbucks executive order, Kansas has a serious problem that everyone in this room should be deeply concerned about, and it shouldn't matter whether you're a Republican or a Democrat. That problem is that your governor has coordinated secretly with outside groups to impact elections in your state in serious ways, on at least one occasion, probably two, and maybe more.

And if you want to put a stop to this behavior, uncover any other secret agreements that may not have surfaced yet, and take back control of the times, places, and manner of elections in Kansas, then this legislature must take immediate and decisive action.

With that, we welcome any questions the committee might have.