



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**KRIS W. KOBACH**  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.AG.KS.GOV

December 19, 2023

ATTORNEY GENERAL OPINION NO. 2023-13

The Honorable Francis Averkamp  
State Representative, 61st District  
State Capitol, Room 187-N  
Topeka, KS 66612

Re: Elections—Original Canvass of Elections—Postelection Audit of Votes  
Cast; Procedure

Elections—Voting Procedure—Paper Ballot with Distinctive  
Watermark Required

Synopsis: Election officials conducting postelection audits must review the  
official paper ballots identified in K.S.A. 25-2912 rather than printed  
ballot images. Cited herein: K.S.A. 25-2912; 25-3009; 77-420; K.A.R. 7-  
47-1.

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Dear Representative Averkamp:

As a member of the Kansas House of Representatives, you ask whether K.S.A. 25-3009 requires that election officials conducting postelection audits must review original paper ballots rather than ballot images. We conclude that the law requires a review of the official paper ballots; a county may not substitute printed ballot images.

K.S.A. 25-3009(a) requires, after certain elections, that county election officers conduct a postelection audit of votes cast in 1% of all precincts, with a minimum of

one precinct within the county. The races to be audited are specified in K.S.A. 25-3009(b)(2). K.S.A. 25-3009(b)(1) provides that “[t]he audit shall be performed manually and shall review all paper ballots selected pursuant to subsection (a).”

The statute also provides for audits of any federal, statewide, or state legislative race in which the margin of victory is within 1% of the total number of votes cast.<sup>1</sup> These close-election audits are to be conducted in the same manner as other postelection audits, except they involve reviewing the ballots in 10% of county precincts in the specified race.<sup>2</sup>

K.S.A. 25-3009(f) authorizes the Secretary of State to adopt rules and regulations governing the conduct and procedures of postelection audits. The statute was enacted in 2018. In 2019, the Secretary of State adopted K.A.R. 7-47-1, a regulation governing postelection audit implementation. Subsection (d) of the regulation provides that “[b]allot images may be used for the manual audit if imaging technology exists during the tabulation process on election night.” K.A.R. 7-47-1 was reviewed and approved for legality by the Attorney General’s Office, as required by K.S.A. 77-420.

Also relevant is K.S.A. 25-2912, which the Legislature enacted in 2022. It provides that “[a]ll voting systems used for elections in this state held on or after January 1, 2024, shall require the use of an individual, durable, voter-verified paper ballot with a distinctive watermark established by the secretary of state.”<sup>3</sup> “The paper ballot shall constitute the official ballot and shall be preserved and used as the official ballot suitable for purposes of any audit or recount conducted with respect to any election in which the voting system is used.”<sup>4</sup>

Statutory interpretation begins with the text of the statute.<sup>5</sup> When the statutory text is plain and unambiguous, courts will not speculate about legislative intent.<sup>6</sup> Courts must construe statutes relating to the same subject *in pari materia*, even if they were enacted at different times, reconciling provisions to bring them into workable harmony, if possible.<sup>7</sup> “[T]he doctrine of *in pari materia* has utility beyond those instances where statutory ambiguity exists.”<sup>8</sup> “It can be used as a tool to assess whether the statutory language is plain and unambiguous in the first

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<sup>1</sup> K.S.A. 25-3009(b)(2)(C).

<sup>2</sup> *Id.*

<sup>3</sup> K.S.A. 25-2912(a)(1)(A).

<sup>4</sup> K.S.A. 25-2912(a)(3).

<sup>5</sup> *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; *State ex rel. Schmidt v. Kelly*, 309 Kan. 887, 899, 441 P.3d 67 (2019) (quoting *Flowers v. Marshall*, 208 Kan. 900, 905, 494 P.2d 1184 (1972)).

<sup>8</sup> *Bruce*, 316 Kan. at 224.

instance, and it can provide substance and meaning to a court’s plain language interpretation of a statute.”<sup>9</sup>

K.S.A. 25-3009(b)(1)’s requirement that the audit “shall review all paper ballots” most naturally refers to the original paper ballots rather than ballot images. Nevertheless, the Secretary of State’s Office believes that “paper ballots” is ambiguous and could include printed images of the ballots.<sup>10</sup> The Secretary of State’s Office reports that when K.S.A. 25-3009 was first enacted, several counties used Direct Recording Electronic (DRE) voting systems which did not involve a physical paper ballot and could only create ballot images. Thus, an audit involving DRE systems would necessarily involve reviewing ballot images. The same legislation that first provided for postelection audits prohibited counties from acquiring DRE systems in the future but did not prohibit counties from continuing to use existing DRE systems.<sup>11</sup> According to the Secretary of State’s Office, no counties currently use DRE systems.

Even if the term “paper ballots” could be considered ambiguous when K.S.A. 25-3009(b)(1) was first adopted, that is no longer the case after the enactment of K.S.A. 25-2912.<sup>12</sup> When K.S.A. 25-3009(b)(1) and K.S.A. 25-2912 are construed *in pari materia*, we believe that they require election officials conducting postelection audits to review the “paper ballots” that are designated as the “official ballot[s]” under K.S.A. 25-2912, not printed ballot images. To the extent there was previously any ambiguity about the meaning of “paper ballot[ ]” when K.S.A. 25-3009(b)(1) was read in isolation, that ambiguity is resolved by K.S.A. 25-2912, which provides that all voting systems shall require the use of an “individual, durable, voter-verified paper ballot with a distinctive watermark established by the secretary of state.” K.S.A. 25-2912 repeatedly refers to these “paper ballots.” It is this “paper ballot”—and not a print-out of the ballot image—that constitutes the “official ballot” that “shall be preserved” and is “suitable for purposes of any audit . . . .”<sup>13</sup> K.S.A. 25-2912 thus provides a clear and definite meaning for the term “paper ballot,” a meaning that also controls for the purposes of interpreting K.S.A. 25-3009(b)(1).

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<sup>9</sup> *Id.*

<sup>10</sup> As is our usual practice, we sought input from relevant stakeholders before issuing this opinion.

<sup>11</sup> L. 2018, Ch. 116, § 9(d) (codified at K.S.A. 25-4403(d)).

<sup>12</sup> We recognize that K.A.R. 7-47-1 was once again approved for legality earlier this year, after the enactment of K.S.A. 25-2912, but that submission did not involve any changes to subsection (d)’s reference to ballot images. While the Attorney General’s Office’s review under K.S.A. 77-420 does entail the entire regulation, that review unfortunately may not always catch legal issues with existing, previously approved regulatory language.

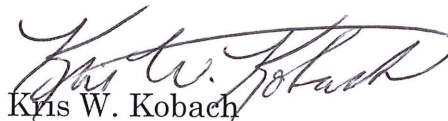
<sup>13</sup> The Secretary of State’s Office also notes that some military and overseas ballots are transmitted to elections offices as images. But that is a function of the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20301-20311. To the extent that federal law preempts the “paper ballot” requirement in K.S.A. 25-2912(a)(1)(A), postelection audits may as a matter of necessity be required to use printed images of those ballots.

We understand the practical reasons why some counties, particularly larger counties, wish to use printed ballot images rather than official paper ballots in conducting postelection audits. Postelection audits involve the manual review of ballots from specified precincts, but ballots do not arrive at county election offices sorted by precinct. Hand sorting ballots by precinct can be a time- and labor-intensive process. Ballot images, which are created and saved when ballots are inserted into tabulators, can be printed by precinct, thus saving significant time and effort. The Secretary of State's Office reports that using ballot images can save a large county up to two days of ballot sorting efforts. This is particularly important given the short time period for postelection audits, which must occur within 13 days after the election (during which period election staff have other responsibilities). The requirement to sort ballots by precinct can be particularly burdensome for close election audits, which involve 10% of precincts in a county rather than the 1% in other postelection audits.

Policy concerns cut the other way as well. After all, one purpose of postelection audits is to assess the accuracy of the ballot tabulators. Relying on ballot images generated by those tabulators arguably undermines that goal.

Regardless, policy concerns, one way or the other, cannot override the plain language of the relevant statutes. The Legislature has made the policy determination, and the statutory text reflects that decision by the Legislature. Whether election officials conducting postelection audits should be authorized to review printed ballot images instead of official paper ballots—or whether the time period for postelection audits needs to be extended to account for the burdens of hand sorting official paper ballots—are questions for the Legislature to address in the future, if the Legislature so chooses. For now, the Legislature has provided that postelection audits must review the official paper ballots.

Sincerely,



Kris W. Kobach  
Attorney General



Dwight R. Carswell  
Deputy Solicitor General