IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

DAVID OREL,

Petitioner,

vs.

KANSAS DEMOCRATIC PARTY, *et al.*,

Respondents.

KRIS W. KOBACH, in his official capacity as Kansas Secretary of State,

Intervenor-Petitioner.

Case No. 2014-CV-958

Division 6

INTERVENOR-PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO THE PETITION FOR WRIT OF MANDAMUS

COMES NOW Kris W. Kobach, in his official capacity as the Kansas Secretary of State ("the Secretary") and as a putative Intervenor-Petitioner in the case at bar, hereby submits this Response to the Respondents' memorandum filed earlier today. Given the three-hour time limit for responding to the Respondents' memorandum (an entirely understandable deadline in light of the expedited nature of these proceedings), the Secretary has exercised his best effort to address all of the arguments raised in the Respondents' memorandum. To the extent any issue is not addressed in this Reply, however, the Secretary affirmatively disclaims any intent to waive such issue, particularly in the wake of the Court's telephonic scheduling order directive from last Thursday, September 24, that no written reply would be required.

I. The Petition is Not Moot by Virtue of the Secretary Having Given an Initial Certification of the General Election Ballot on September 19, 2014.

The Respondents first contend that the case should be dismissed as moot based on the Secretary's initial certification, on September 19, 2014, of the official list of candidates for the November general election. Because this initial certification omitted the name of a Democratic Party nominee for the office of United States Senator, the Respondents maintain that it is now too late to modify the ballot, notwithstanding the statutory directive in K.S.A. 25-3905(a) that the Democratic Party must submit a new candidate to fill the vacancy created by Chad Taylor's post-primary withdrawal from the race.

The Kansas legislature clearly contemplated, however, that the Secretary of State might have to *recertify* a ballot when changes become necessary due to candidate withdrawals and last-minute filling of vacancies. Indeed, K.S.A. 25-309 – which is titled "Certification of and placing on ballot of name of person nominated to fill vacancy" – squarely addresses this very scenario:

> When such certificate is filed with the secretary of state, he shall, in certifying nominations to the various county election officers, insert the name of the person thus nominated to fill vacancy in place of the original nominee; and in the event that he has already sent forward his certificate, he shall forthwith certify to the election officers of the proper counties the name and description of the person so nominated to fill the vacancy, the office he is nominated for, with the other details mentioned in certificates of nomination filed with the secretary of state. The names so supplied for the vacancy shall, if the ballots are not already printed, be placed on the ballots in place of the name of the original nominee; or, if the ballots have been printed, new ballots, whenever practicable, shall be furnished.

If the initial certification were set in stone, K.S.A. 25-309 would be rendered meaningless. *See Gannon v. State*, 298 Kan. 1107, 1146, 319 P.3d 1196, 1223 (2014) (statutes must be interpreted in manner that gives effect to clear text, lest the language adopted by the legislature becomes mere surplusage).

The Respondents argue that if the Democratic Party is ordered to fulfill its statutory obligation under K.S.A. 25-3905(a) to submit a new nominee for U.S. Senate to fill the vacancy created by Chad Taylor's withdrawal, that relief is rendered moot by virtue of the fact that 400

conditional ballots under the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), were sent out on September 19 and September 20. This argument is flawed for multiple reasons.

In an effort to comply with the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301 *et seq.*, the Secretary prepared his initial certification of the candidates for the November 4 general election ballot on September 19 so that absentee ballots could be sent out by county election officials to uniformed and overseas voters within the normal 45-day time frame set forth in UOCAVA. *See* 52 U.S.C. § 20302(a)(8)(A). Across the entire State of Kansas, however, there are a mere 400 UOCAVA voters, approximately 50 of whom are members of the military deployed overseas. Moreover, pursuant to the Secretary's direction, the ballots transmitted to UOCAVA voters included an accompanying notice expressly advising them of the pendency of this case and its possible impact on the list of candidates in the U.S. Senate race. This ballot notice states as follows:

> Accompanying this letter is your UOCAVA ballot for the general election to be held on November 4, 2014. As you may be aware, a case is pending before the Kansas Supreme Court concerning the Democratic nomination for the office of United States Senator. It is possible that, as a result of that litigation, the Court may order that a different ballot be sent to you which contains the name of the Democratic nominee for the office of United States Senator. Regardless of what the Court decides, we will be sending you a subsequent letter once the case is decided to further inform you about this ballot.
>
> You may vote using the ballot accompanying this letter as soon as you receive it, or you may wait to vote until you've received further notification from us. To ensure that your vote is counted your ballot must be received by November 4, 2014, unless a later deadline is communicated in our subsequent correspondence to you. If a replacement ballot is sent to you, and you have already returned the ballot accompanies this letter, only your replacement ballot will be counted.

See Exh. B-3 to Intervenor-Pet'r's Mem. in Supp. of Petition, at p. 2. The possibility that some UOCAVA voters might immediately vote their ballot and return it by email was expressly

contemplated and provided for in this notice. If this Court issues the requested writ and orders the Kansas Democratic Party to comply with its legal duty to name a replacement nominee for Mr. Taylor, there will be sufficient time to send (or email) replacement ballots to these UOCAVA voters and have those ballots counted in the general election.

Endorsing the Respondents' mootness position would also encourage gamesmanship and serve as a disincentive to future Secretaries of State to certify *any* ballots (including UOCAVA ballots) during the pendency of a pre-election dispute. The orderly administration of our State's election statutes would potentially be thrown into chaos if that argument were to prevail. Both the courts and election officials would be put in the position of picking and choosing what statutes they want to comply with. Yet as described below, nothing in UOCAVA or any other federal law precludes states from modifying ballots following an initial certification. In sum, the Respondents' mootness argument should be rejected.

II. Ordering the Kansas Democratic Party to Submit a New Nominee for the U.S. Senate Race Can Be Done Consistent With UOCAVA

The Respondents next contend that this case is moot because the normal 45-day deadline for transmitting absentee ballots to uniformed and overseas voters under UOCAVA has passed. Respondents read this statute far too broadly.

It is true that UOCAVA generally requires election officials to transmit validly requested absentee ballots to military and overseas voters no later than 45 days before the election. *See* 52 U.S.C. § 20302(a)(8)(A). But the statute contains an express exception in cases where a State is unable to meet this requirement "due to an undue hardship." *Id.* § 20302(g)(1). In fact, "a delay in generating ballots due to a legal contest" is one of the expressly contemplated forms of undue hardship identified in the statute. *Id.* § 20302(g)(2)(B)(ii). Far from *precluding* the relief that is

being requested in this action, UOCAVA actually *envisions* it and lays out a series of steps for addressing such circumstances.

Moreover, the U.S. Department of Justice, which is charged with enforcing UOCAVA, routinely enters into legal memoranda of agreements with jurisdictions that miss the 45-day mailing target for one reason or another. These agreements implement remedial measures tailored to the particular circumstances and are designed to ensure that military and overseas voters receive their ballots expeditiously and have adequate time to submit those ballots in time to be counted. In virtually all of the agreements, the Department of Justice agrees to move the 45-day window forward in time, so the at the relevant UOCAVA ballots may be accepted by the jurisdiction an equivalent number of days after election day. All of those agreements are available on the Justice Department's website. *See* http://www.justice.gov/crt/about/vot/litigation/caselist.php. Indeed, in 2010, under Kansas Secretary of State Chris Biggs, several Kansas counties were covered by an agreement that permitted those counties to move the 45-day UOCAVA window. One county, Stevens County, was required to accept UOCAVA ballots a full sixteen days after election day.

The Secretary has been in consultation with representatives from the Justice Department's Civil Rights Division and has already proposed relief which, in the event this Court issues the requested writ of mandamus, will ensure that the 400 UOCAVA voters will all receive their newly certified ballots with more than ample time to cast and return such ballots in time to be counted. Those communications have been ongoing; and the discussion of the possibility that the 45-day period might need to be moved began during the period that *Taylor v. Kobach* was pending in the Kansas Supreme Court.

The Secretary initially certified the November general election ballot on September 19, notwithstanding the pendency of this mandamus action, because he wanted to meet the 45-day mailing target and because he had no way of knowing what the outcome of this litigation would be. There is certainly no impediment in UOCAVA, however, that would preclude this Court from holding the Kansas Democratic Party to its legal obligation to fill a vacancy under K.S.A. 25-3905(a). If the Court issues relief here, the Secretary will still be in a position to comply with UOCAVA, and no uniformed or overseas voters will be disenfranchised. The Respondents have not considered the clear text of UOCAVA in framing their mootness argument. It is clear that this case is not moot and that exigent circumstances such as those presented here are addressed in the text of UOCAVA.

III. Requiring the Kansas Democratic Party to Comply with K.S.A. 25-3905(a) By Submitting a New Nominee Does Not Violate Its First Amendment Rights

The Respondents maintain that any Court directive requiring them to comply with K.S.A. 25-3905(a) by naming a new Democratic nominee for U.S. Senate to replace Mr. Taylor on the ballot would interfere with their right to free association under the First and Fourteenth Amendments of the U.S. Constitution. There are a number of flaws in this argument.

A. Standard for Evaluating First Amendment Claim in Election Law Context

Although political parties' governance, structure, and activities enjoy protection under the First Amendment, "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). In evaluating whether a state election law contravenes a party's associational rights under the First and Fourteenth Amendments, the Court must "weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the

State's concerns make the burden necessary." *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). While regulations that impose severe restrictions on a party's rights "must be narrowly tailored and advance a compelling state interest," a far "less exacting review" is necessary for lesser burdens. *Id.* Indeed, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Id.* A contrary rule would inappropriately "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433.

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* (quotation omitted). A state's regulatory interests thus "need only be sufficiently weighty to justify the limitation imposed on the party's rights." *Timmons*, 520 U.S. at 364. And there is no requirement that the weightiness of the State's asserted justifications be predicated on any elaborate, empirical verification or data. *Id.*

B. Kansas Has a Strong Interest in Enforcing the Vacancy Replacement Requirements Set Forth in K.S.A. 25-3905(a)

Kansas has a well-established interest in protecting the integrity, fairness, and efficiency of the election process. *Id.* Kansas also has an indisputably legitimate and strong interest in vindicating the voting rights of the 65,819 citizens who cast a ballot in the Democratic primary, not to mention the rights of every member of the electorate from Kansas who wishes to vote for a Democrat in the U.S. Senate race in November. If a small cabal of party bosses is given license to deprive the members of their party the right to even vote for a party-affiliated candidate, the voters would be effectively disenfranchised and the entire election scheme would be thrown into disarray. Sanctioning the Kansas Democratic Party's deliberate disregard of the requirements of

K.S.A. 25-3905(a) essentially prevents individual Democratic voters from exercising their right to vote in a meaningful way. It renders their participation in the primary process a nullity, and serves as a deterrent on their participation in the general election since many will no longer have a candidate to support.

It bears underscoring here that the Kansas Democratic Party made a conscious choice to select their nominee for the U.S. Senate race through a primary. The party, if had wanted to do so, could have chosen to opt out of the primary process, and select a candidate through some much-less democratic means, such as party delegates choosing a candidate at a convention. Had the party pursued such a path, it would have been free to select any candidate it wanted – or no candidate at all – and the views of Democratic-affiliated voters would be irrelevant. *See Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 122-24 (1981) (national party's internal rules for selecting delegates to party convention were entitled to respect and not subject to interference by inconsistent state election laws.) But once the Kansas Democratic Party decided to open their candidate selection process to the democratic process with a binding primary vote, the party was precluded from making a post-hoc change to the rules. Granted, the applicable Kansas election statute confers wide discretion on the party to fill a vacancy following a candidate withdrawal, but that does not mean the party can simply choose no candidate at all and thereby turn the entire primary election into a sham.

Finally, the Respondents are off base when they suggest it is the Kansas Democratic Party's associational interests that are implicated here. As the U.S. Supreme Court observed in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980), there is no impermissible burden to the associational rights of an entity if the public rightfully perceives someone else to be the actual speaker. Under the facts of this case, the voters will see the new Democratic nominee in

the general election as the speaker, not the members of the state committee of the Kansas Democratic Party.

C. Case Law Cited by the Respondents Is Inapplicable to the Facts of this Lawsuit

The case law cited by the Respondents to support their right-of-association claim is largely inapposite. For example they rely heavily on a case that involved a party being compelled to associate with a particular candidate that the party did not wish to associate with. *Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996). Other cases are inapposite because the situation therein unlike the present case. For example, *California v. Jones*, 530 U.S. 567 (2000), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), involved states that attempted to force parties to hold open or closed primaries, respectively. All of those cases involved a state *overriding* a party's decision on whether and how to nominate a candidate. Here, though, the State is not interfering with the Respondents' internal decision-making. Instead, it is *effectuating* the associational and electoral rights of Democratic voters by seeking to ensure that they have a Democratic candidate on the general election ballot.

The Secretary finds it difficult to see how the Respondents can claim any harm from his actions. The Kansas Democratic Party cannot be opposed to having Democratic candidates in general elections, since nominating and electing candidates is the central unifying purpose of political parties. Requiring the party to nominate someone of its own choosing, therefore, should have no deleterious effect whatsoever.

As noted above, the Respondents made a bargain with their fellow Democrats that they would (i) nominate a candidate, and (ii) do so through the primary process. The second part of that bargain was extinguished when the winner of the Democratic primary withdrew from the election. K.S.A. 25-3905(a) merely ensures that the Respondents do not repudiate Democratic

voters' rights by failing to honor the first part of the bargain – i.e., the promise to nominate a candidate. This is fundamentally different from any effort by a state to override a party's decision to not select a candidate through a primary or to not nominate a candidate at all.

No internal policy or practice of the Kansas Democratic Party is being undermined here, nor is the party's autonomy being compromised. The party's raison d'être, after all, is electing Democratic candidates into office. To the extent the Respondents do not want a candidate in *this* election in order to aid a third-party candidate, the State cannot be required to *assist* such nakedly partisan efforts, particularly since such a bait-and-switch would have an adverse effect on Democratic voters throughout the State who want the opportunity to cast a ballot in favor of a candidate actually affiliated with their party.

In sum, the State of Kansas has a strong interest in safeguarding the voting rights of all its citizens and ensuring the integrity of the electoral process. The interests of the Respondents, on the other hand, are exceedingly minimal and appear focused primarily on thwarting the interests of individual Democratic voters in order to shift votes to a purportedly "independent" candidate who disclaims (at least publicly) any affiliation with the Democratic Party. On these facts, the Secretary believes that the scales tilt heavily on his side and, therefore, requests the Court to issue the requested writ of mandamus.

D. A Write-In Option for Democratic Voters is Not a Sufficient Substitute.

The Respondents recognize that the rights of Democratic voters who wish to vote for a candidate of their own party are also at issue in this matter. Their response is simply to say that those voters can vindicate those rights by simply writing in a candidate of their choosing.

However, the United States Supreme Court has expressly rejected this notion. "[T]his [write-in] opportunity is not an adequate substitute for having the candidate's name appear on the

printed ballot." *Anderson v. Celebrezze*, 460 U.S. 780, 800 fn.26 (1983). See also *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) ("[A candidate] relegated to the write-in provision, would be forced to rest his chances solely upon those voters who would remember his name and take the affirmative step of writing it on the ballot."). For this reason, the Respondents argument cannot stand.

IV. There is no Viable Equal Protection Claim in this Matter.

The Respondents also claim that the Secretary was somehow biased in his exercise of the statutory duties of the Kansas Secretary of State, and that that alleged bias constitutes a constitutional violation of their right to equal protection of the law under the Fourteenth Amendment.

At the outset it must be noted that the Respondents have not described any set of facts that comes even remotely close to unequal treatment under the law. It must also be pointed out that any equal protection claim of this nature would only be subject to minimal scrutiny, as it does not involve any suspect classification. But the biggest flaw in this argument is that it proves too much. By the Respondents' logic, none of the scores of elected, party-affiliated district judges in Kansas would be capable of rendering decisions in politically-charged cases without violating the equal-protection rights of a person from an opposing party in the litigation before the court.

The fact that the incumbent Secretary of State—an elected public office—happens to be a member of the Republican Party and that the Respondents here are members of the Democratic Party hardly is grounds for subjecting the Secretary's actions to greater judicial scrutiny, let alone concluding that a constitutional violation might exist. Indeed, the inherent nature of the Secretary's office is such that he is frequently called upon to interpret and enforce statutes in the

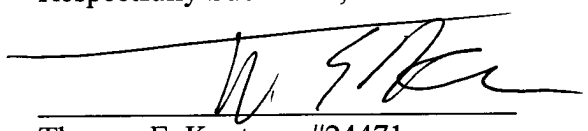
context of partisan political disputes. If individuals could successfully raise constitutional challenges to the Secretary's actions based on the officeholder's personal political activities, the office would be ground to a halt. In fact, in analogous circumstances, the U.S. Supreme Court has rejected the notion that judicial candidates running for elected office are precluded from announcing their views on disputed political or legal issues during the campaign. See *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2011).

V. The Kansas Democratic Party Has Had More than Ample Time to Find a Replacement Nominee for the United States Senate Seat

The Respondents finally suggest that there is insufficient time for them to find a replacement nominee to fill the vacancy triggered by Chad Taylor's withdrawal. This argument not only fails to stand up to scrutiny, it is downright frivolous. Even assuming – dubious as the assumption might be – that the first hint the Respondents had that Mr. Taylor planned to withdraw as the Democratic nominee for U.S. Senate was the submission of his formal withdrawal letter to the Secretary of State's Office on September 3, 2014, nearly *four weeks* have passed in which the Kansas Democratic Party appears to have made no efforts at all to fill the vacancy. Moreover, once the Kansas Supreme Court issued its opinion on September 18, 2014, ordering Mr. Taylor's name to be withdrawn from the ballot, the Secretary issued a formal notice to Respondent Joan Wagnon within hours of the decision, alerting her to the vacancy and advising her of the Kansas Democratic Party's obligation under K.S.A. 25-3905(a) to fill the vacancy. *See* Exh. B-2 to Intervenor-Pet'r's Mem. in Supp. of Petition. The letter requested that the party submit the name of a replacement candidate no later than September 26, 2014, a slightly truncated eight-day time period versus the ten days permitted by K.S.A. 25-3905(a). That request was obviously ignored.

The Kansas Democratic Party's deliberate intransigence cannot be rewarded by excusing the candidate replacement mandate clearly set forth in K.S.A. 25-3905(a). This would be akin to the proverbial child who kills his parents and then complains of being orphaned. Given today's modern communications, it would hardly be difficult to convene a telephonic meeting for the purpose of selecting a new nominee. Whatever difficulties may exist, however, are entirely a byproduct of the Kansas Democratic Party's own actions.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 29th day of September, 2014, I caused a copy of the foregoing to be filed with the Clerk of the Court, hand-delivered additional copies to the chambers of the Honorable Judges Evelyn Wilson, Larry Hendricks, and Franklin Theis, and caused a copy to be served on the following parties, by electronic mail, addressed as follows:

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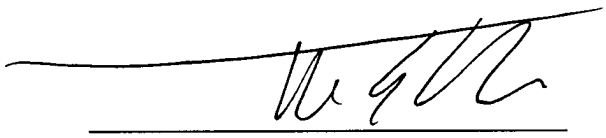

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