

IN THE SUPREME COURT OF THE STATE OF KANSAS

DAVID OREL,)
)
)
 Petitioner,)
)
 v.)
)
 KANSAS DEMOCRATIC PARTY,)
)
 JOAN WAGNON, in her official capacity)
 as Chair of the Kansas Democratic Party,)
)
 LEE KINCH, in his official capacity as)
 Vice Chair of the Kansas Democratic Party,)
)
 and)
)
 JASON PERKEY, in his official capacity)
 as Executive Director of the Kansas)
 Democratic Party.)
)
 Respondents.)
)
)
)

FILED
SEP 18 2014
 HEATHER L. SMITH
 CLERK OF APPELLATE COURTS

Original Action No. 112487-5

PETITION FOR WRIT OF MANDAMUS

Petitioner David Orel hereby respectfully seeks a writ of mandamus compelling Respondents—the Kansas Democratic Party (“KDP”), and Joan Wagnon, Lee Kinch, and Jason Perkey, in their official capacities as Chair, Vice Chair, and Executive Director of the KDP, respectively—to name a Democratic Party candidate whose name and party affiliation will appear on the ballot for United States Senate in the November 4, 2014, general election. On September 18, 2014, this Court granted a writ of mandamus compelling Secretary of State Kris Kobach to withdraw from the ballot Chad Taylor, the winner of the Democratic Primary. Accordingly, Respondents have a clearly defined legal duty to name a replacement candidate under K.S.A. § 25-3905(a). Because federal law requires the State to finalize, print, and transmit the ballots for the general election by

September 20, 2014 (52 U.S.C. § 20302(a)(8); Kan. Stat. Ann. § 25-1220), this petition involves an extremely urgent matter of profound public importance. Petitioner respectfully requests that the Court review this case and grant a writ of mandamus at its earliest convenience.

In support of his petition and motion, Petitioner alleges the following:

I. JURISDICTION AND PARTIES

1. This Court has original jurisdiction over Petitioner's mandamus action under Article 3, § 3 of the Kansas Constitution, K.S.A. § 60-801 *et seq.*, and Rule 9.01 of the Rules of the Supreme Court of Kansas.

2. An original action in this Court for mandamus is necessary because adequate relief is not available to Petitioner in the district courts. *See* S. Ct. Rule 9.01(b). Given the extraordinary urgency of this matter, this Court's review is necessary to ensure Respondents' timely compliance with their clear duties under Kansas law, specifically K.S.A. § 25-3905(a).

3. Petitioner David Orel is a registered Democratic voter who voted in the Democratic Primary and intends to vote for the Democratic candidate in the general election for U.S. Senate. Petitioner has complied with all relevant legal requirements to invoke this Court's original jurisdiction, including Supreme Court Rule 9.01(a) requiring Petitioner to provide a Memorandum of Points and Authorities in support of this Petition. *See* S. Ct. Rule 9.01(a).

4. Respondent Kansas Democratic Party is the state-level affiliate of the National Democratic Party, and is responsible for overseeing the Democratic Party's efforts in Kansas. KDP may be served at 700 SW Jackson, Suite 706, Topeka, KS 66603. KDP is registered as a party committee with the Federal Election Commission and with the Kansas Secretary of State's Office's Elections Division under the name Kansas Democratic Party, and is registered as a Kansas not-for-profit corporation with

the Kansas Secretary of State's Office's Business Center under the name The Kansas Democratic Party, Incorporated.

5. Respondent Joan Wagon is Chair of the KDP. Ms. Wagon may be served at 700 SW Jackson, Suite 404, Topeka, KS 66603. In her official capacity as Chair, Ms. Wagon is responsible for, among other things, overseeing the Party's handling of election-related matters, including, when necessary, the naming of a replacement candidate to fill a vacancy that occurs after a primary election pursuant to K.S.A. § 25-3905(a).

6. Respondent Lee Kinch is Vice Chair of the KDP. Mr. Kinch may be served at 700 SW Jackson, Suite 404, Topeka, KS 66603. In his official capacity as Vice Chair, Mr. Kinch is responsible for, among other things, assisting in the Party's handling of election-related matters, including, when necessary, the naming of a replacement candidate to fill a vacancy that occurs after a primary election pursuant to K.S.A. § 25-3905(a).

7. Respondent Jason Perkey is Executive Director of the KDP. Mr. Perkey may be served at 700 SW Jackson, Suite 404, Topeka, KS 66603. In his official capacity as Executive Director, Mr. Perkey is responsible for, among other things, assisting in the Party's handling of election-related matters, including, when necessary, the naming of a replacement candidate to fill a vacancy that occurs after a primary election pursuant to K.S.A. § 25-3905(a).

II. STATEMENT OF FACTS

8. On August 5, 2014, Chad Taylor prevailed in the Democratic Primary for U.S. Senate.

9. On September 3, Mr. Taylor submitted a letter to the office of Secretary of State Kris Kobach, purporting to withdraw his name from the State's general-election ballot "pursuant to K.S.A. 25-306b(b)."

10. The next day, September 4, Secretary Kobach informed Mr. Taylor that his withdrawal did not satisfy the requirements of section 25-306b(b) and therefore would not be recognized.

11. On September 9, Mr. Taylor filed a petition for a writ of mandamus compelling Secretary Kobach to remove Mr. Taylor's name from the ballot.

12. This Court granted Mr. Taylor's petition for a writ of mandamus on September 18. *See* Order Granting Mandamus. Accordingly, Secretary Kobach removed Mr. Taylor's name from the general-election ballot as the Democratic Party candidate for U.S. Senate.

13. While Mr. Taylor's petition remained pending, Petitioner's counsel had sent—via e-mail—a letter to Respondents on September 16, explaining that Petitioner “wants to ensure that a qualified Democratic candidate is on the November ballot,” and asking Respondents to confirm that, “in the event that the Kansas Supreme Court orders Mr. Taylor's name to be withdrawn from the ballot, the Party will be complying with Kansas law by naming a new candidate for U.S. Senate no later than the close of business on Thursday, September 18, to ensure that there is sufficient time for the candidate's name to be included on the ballot.” *See* Exhibit A.

14. Respondents did not respond to Petitioner's letter or otherwise confirm that they intend to name a replacement Democratic Party candidate for U.S. Senate.

15. Currently, there is no Democratic Party candidate for U.S. Senate on the general-election ballot.

16. Under federal and state law, the State is required to send the general-election ballots to Kansan members of the U.S. Armed Forces no later than 45-days prior to the date of the general election. *See* 52 U.S.C. § 20302(a)(8); K.S.A. § 25-1220. Because the general election is to be held on November 4, Secretary Kobach must send the ballots by September 20. Secretary Kobach has indicated that, in order to comply with this deadline, the ballots must be printed no later than September 19. *See*

Respondent's Notice Regarding Scheduling at 4, *Taylor v. Kobach*, No. 14-112431-S (Sept. 10, 2014).

III. GROUNDS FOR RELIEF

17. The writ of mandamus may be used “to compel inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, *or from operation of law.*” Kan. Stat. Ann. § 60-801 (emphasis added). Indeed, as this Court has long held, mandamus “will control the conduct of private individuals” and “corporations” when, among other things, such relief is “necessary to sweep away every impediment or hindrance to complete performance of the [statutory] duty required.” *See Kreipe v. Commercial Nat. Bank*, 114 Kan. 910, 911 (1923); *see also Carolina Indus. Prods., Inc. v. Learjet, Inc.*, 189 F. Supp. 2d 1147, 1171 (D. Kan. 2001) (observing that section 60-801 authorizes a writ of mandamus against private corporations and persons when they have failed to satisfy a “duty owed” under law, even those duties created by federal regulation).

18. Here, Respondents have a clear statutory duty to name a Democratic candidate for U.S. Senate to fill the vacancy created by Mr. Taylor's withdrawal. That duty is set forth in K.S.A. § 25-3905(a), which provides that “[w]hen a vacancy occurs after a primary election in a party candidacy, *such vacancy shall be filled by the party committee* of the congressional district, county or state, as the case may be.”

19. When this Court granted a writ of mandamus compelling Secretary Kobach to withdraw Mr. Taylor's name from the general-election ballot, section 25-3905(a) required Respondents to immediately fill that vacancy by naming a new Democratic candidate for U.S. Senate.

20. Respondents, however, have not yet done so. Indeed, Respondents never even responded to Petitioner's letter asking them to confirm that the KDP would name a replacement candidate in the event of Mr. Taylor's withdrawal. And Respondents have

publicly stated that they actually have *no intention* of naming a replacement candidate unless they are *directly ordered* to do so by this Court. In an interview with the Associated Press, Respondent Wagnon stated, when asked whether the KDP would name a replacement candidate, that “[m]y position is until the court tells me to do something, I’m not going to [do] anything.” See Bryan Lowry, *Justices Question Why Democrat Chad Taylor Can’t Withdraw from Senate Race*, THE WICHITA EAGLE (Sept. 16, 2014, 4:36 PM), <http://goo.gl/ts9Zuz> (attached as Exhibit B).

21. Because federal and state law require the State to distribute general-election ballots no later than September 20, the Court should grant this petition for a writ of mandamus and compel Respondents to immediately name a replacement candidate.

22. Granting Petitioner’s requested mandamus relief would constitute an appropriate exercise of this Court’s discretion. Section 25-3905(a) of Kansas’s statutory code, like all election laws, “provide[s] [a] means for effective exercise of suffrage.” *Cure v. Bd. of Cnty. Comm’rs*, 263 Kan. 779, 786 (1998) (internal quotation marks omitted). Respondents’ compliance with section 25-3905(a) is, therefore, essential to effectuating that “fundamental” “right to vote for elected representatives” which “constitute[s] the foundation of our representative society.” *Provance v. Shawnee Mission Unified Sch. Dist.*, 231 Kan. 636, 641–43 (1982) (quoting *Kramer v. Union Sch. Dist.*, 395 U.S. 621, 626 (1969))). In other words, the public interest would best be served by granting this petition for a writ of mandamus. See, e.g., *State v. Bd. of Comm’rs of Miami Cnty.*, 133 Kan. 325, 326 (1931) (noting that the propriety of mandamus depends on “the larger, public interest which may be concerned”).

23. Put simply, mandamus is appropriate here to ensure that Respondents comply with their clear legal obligations and to preserve the “personal and individual” right to vote that forms “the bed-rock of our free political system,” *Moore v. Shanahan*, 207 Kan. 645, 649 (1971).

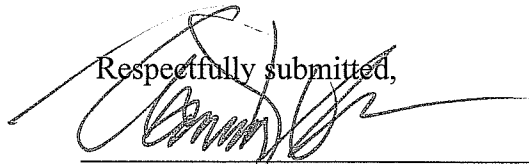
IV. RELIEF SOUGHT

24. For the foregoing reasons, and those stated in the supporting Memorandum, Petitioner seeks the following relief:

- a. An order compelling Respondents to fill the vacancy created by Chad Taylor's withdrawal by immediately naming a new candidate for U.S. Senate in accordance with Respondents' clearly defined legal duty under K.S.A. § 25-3905(a).
- b. Such other relief as this Court deems just and proper.

Dated: September 18, 2014

Respectfully submitted,



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Counsel for Petitioner David Orel

CERTIFICATE OF SERVICE


The undersigned person hereby certifies that a true and correct copy of the above and foregoing document was served by courier on September 18, 2014, to:

The Kansas Democratic Party, Incorporated
Lawrence C. Gates
Resident Agent, Registered Office
700 Jackson, Suite 706
Topeka, KS 66603

Joan Wagnon
700 SW Jackson
Suite 404
Topeka, KS 66603

Lee Kinch
700 SW Jackson
Suite 404
Topeka, KS 66603

Jason Perkey
700 SW Jackson
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RICHARD B. STEVENS
1899-1991

JOHN W. BRAND
1907-1971

JOHN W. BRAND, JR.
RETIRED

September 16, 2014

VIA E-MAIL (joan@kansasdems.org) ONLY

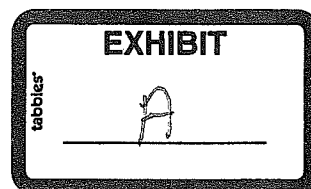
Joan Wagnon, Chair
Kansas Democratic Party
700 SW Jackson, Suite 404
Topeka, KS 66603

Re: Democratic Candidate for U.S. Senate

Dear Ms. Wagnon:

I represent David Orel, a registered Democrat who intends to vote for the Democratic Party's candidate for U.S. Senate in the general election. For this reason, I filed on Mr. Orel's behalf an amicus brief in the Kansas Supreme Court opposing the mandamus petition filed by Chad Taylor, the winner of the Democratic Primary for U.S. Senator, seeking to remove his name from the general-election ballot.

Mr. Orel wants to ensure that a qualified Democratic candidate is on the November ballot. As you undoubtedly know, in the event of a candidate's withdrawal following a primary, Kansas law mandates that "such vacancy shall be filled by the party committee of the congressional district, county or state, as the case may be." Kan. Stat. Ann. § 25-3905(a). The Secretary of State has indicated that, under federal and state law, the State must begin printing ballots no later than Friday, September 19, so that they can be distributed to members of the U.S. Armed Services no later than Saturday, September 20. Accordingly, Mr. Orel wants to know that, in the event that the Kansas Supreme Court orders Mr. Taylor's name to be withdrawn from the ballot, the Party will be complying with Kansas law by naming a new candidate for U.S. Senate no later than the close of business on Thursday, September 18, to ensure that there is sufficient time for the candidate's name to be included on the ballot.

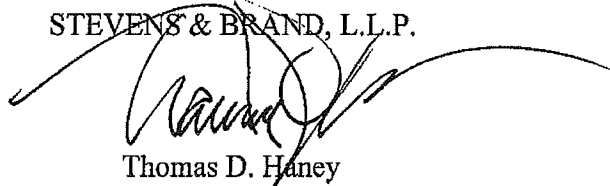


Joan Wagnon
September 16, 2014
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Please respond immediately and confirm that this is your intention.

Very truly yours,

STEVENS & BRAND, L.L.P.

A handwritten signature in black ink, appearing to read 'Thomas D. Haney', is written over the firm name. The signature is stylized and includes a long horizontal flourish extending to the right.

Thomas D. Haney
thaney@stevensbrand.com

cc: Lee Kinch, Vice Chair (via e-mail - lee@kansasdems.org)
Jason Perkey, Executive Director (via e-mail - jason@kansasdems.org)

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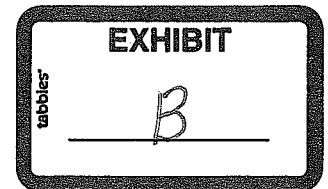
Justices question why Democrat Chad Taylor can't withdraw from Senate race

BY BRYAN LOWRY - EAGLE TOPEKA BUREAU

09/16/2014 10:47 AM | Updated: 09/16/2014 4:36 PM



Kansas Supreme Court Justice Marla J. Luckert asks questions during a hearing of a petition brought by former Democratic U.S. Senate candidate Chad Taylor against Kansas Secretary of State Kris Kobach seeking removal of Taylor's name from the ballot Tuesday, Sept. 16, 2014, in Topeka. CHARLIE RIEDEL/ASSOCIATED PRESS



TOPEKA — Kansas Supreme Court justices grilled Secretary of State Kris Kobach's attorney at a special court hearing Tuesday about whether Democrat Chad Taylor should remain on the ballot as a candidate for U.S. Senate.

Taylor's suit to remove his name from the ballot is unprecedented in the state.

Republicans see Taylor's attempt to withdraw as a not-so-covert plan by national Democrats to boost Greg Orman's independent candidacy against Republican incumbent U.S. Sen. Pat Roberts in November. Democrats say that Kobach, a supporter of Roberts, has overstepped his bounds as secretary of state to keep Taylor on the ballot against his will.

The suit hinges on whether Taylor adhered to a statute that requires candidates to declare

that they are incapable of serving in order to withdraw.

Earlier this month, Kobach determined that Taylor, the district attorney of Shawnee County, failed to do that in a letter he submitted to the Secretary of State's Office on Sept. 3, the deadline to withdraw.

Pedro Irigonegaray, Taylor's attorney, argued that Kobach lacked the legal authority to make that determination because the statute (http://www.ksrevisor.org/statutes/chapters/ch25/025_003_0006b.html) does not specifically say that it's up to the secretary of state to decide whether candidates have met the standard.

He also contended that the statute does not specifically say the declaration has to be in writing.

Edward Greim, who represented Kobach, argued that as the top election officer, Kobach has the power and duty to enforce the statute.

"If it (the declaration) could be made at home to someone's goldfish, then the statute is meaningless," Greim said.

Justice Lee Johnson said the court's role is to interpret the plain language, not to provide meaningful enforcement.

"We have to add language to get to your interpretation," he told Greim.

The justices flooded Greim with questions.

Before he could describe why Taylor's letter missed the requirements, Justice Carol Beier cut in with a question about another letter submitted to the Secretary of State's Office by Miranda Rickel, a House candidate who withdrew from a race in District 5 this year.

Rickel described in her letter how juggling jobs and college classes made it "nearly impossible" to mount a campaign.

"Her letter says it will be 'nearly impossible'...she does not say 'incapable,'" Beier said.

Greim said the letter contained facts that were tantamount to a declaration of incapability, but Irigonegaray said Rickel's letter showed that she was incapable of running, not of serving.

Justice Dan Biles also questioned whether Rickel's letter had been properly notarized, another requirement of the statute. Her letter was stamped by a notary, but unlike Taylor's letter, the notary did not note whether the letter was signed in front of her

Biles said enforcement of this requirement appeared "loosey goosey."

Greim said notarization was a side issue.

"What we're talking about is what the secretary of state can and can't do," Johnson said in response. "You're saying he can ignore a critical procedural aspect but can exercise discretion (about what constitutes a declaration)."

After the hearing Kobach said that his office has employed the same standard of notarization that has been effect since former Secretary of State Ron Thornburgh's tenure, which spanned from 1995 to 2010.

Kobach's response

Kobach's office submitted to the court letters dating to 2006 that show all candidates other than Taylor either declared they were incapable or stated facts that explained their reasons for withdrawing from the race, which Kobach and his attorneys say are tantamount to a declaration.

Kobach said all Taylor had to do to withdraw was say "the magical words" or give a reason for his incapability.

"For whatever reason, Mr. Taylor has not made that declaration," Kobach said. "I don't know what his reason is. I've never heard him answer any questions to a reporter to what the reason is...I'm waiting with bated breath to see it in print."

Taylor left the courtroom quickly after the hearing and did not answer questions from reporters.

Irigonegaray contended that Taylor's letter, which requests his name be withdrawn from the ballot "pursuant to" the statute, does constitute a declaration.

"What else would the words 'pursuant to' mean?" Irigonegaray asked the court. He said the letter "clearly indicated an inability to fulfill the duties of office."

Justice Eric Rosen was skeptical of this argument.

“Isn’t this statute here to prevent what we’re arguing?” Rosen said, pointing out that the statute requires a candidate to be dead or incapable of serving to come off the ballot.

He said that the word “declares” in the statute suggests that a proclamation is needed and using the phrase “pursuant to” could refer to any portion of the statute, not necessarily the declaration of incapability. He said if citation alone were enough that “seems to defeat the purpose of the statute.”

Observing the court

Rick Hasen, an election law expert at the University of California at Irvine, who watched the proceedings via webstream, said he thinks that despite Rosen’s skepticism the justices probably will side with Taylor’s attorney and say that citing the statute satisfied the base requirements.

“Nothing is a sure thing, but enough of the Justices speaking seemed to indicate their belief that Taylor should be allowed to withdraw because Taylor’s declaration of withdrawal complied with the statute...because Kobach lacked the discretion to judge if the letter complied,” Hasen wrote in analysis.

Chief Justice Lawton Nuss suggested that it would disenfranchise voters to keep on the ballot a candidate who has stated in an affidavit that he will not serve if elected. Republicans have contended that allowing Taylor to withdraw would disenfranchise the Democrats who voted in the primary.

This point seemed particularly important to Keen Umbehr, an Alma attorney and the Libertarian candidate for governor, who attended the proceedings as an observer.

“For a lawyer, this is like going to a Super Bowl,” said Umbehr, who thought it was pretty clear that Taylor’s side had gotten the better of Kobach’s in the courtroom.

Ballot timeline

The court is expected to issue a decision quickly; ballots must be printed this week in order to be mailed to absentee voters by Saturday. But a ruling might not end the drama.

A separate statute

(http://www.ksrevisor.org/statutes/chapters/ch25/025_039_0005.html) says that when a vacancy occurs after the primary, it “shall be filled by the party committee of the congressional district, county or state, as the case may be.”

Kobach said that his office would insist that Democrats appoint a replacement candidate. He would not say for certain whether he would be ready to take that issue to court, but he said that was possible.

Joan Wagnon, the state’s Democratic Party chair, told the Associated Press that she did not think it would be physically possible to appoint a replacement at this point.

“My position is until the court tells me to do something, I’m not going to anything,” Wagnon said when asked about that statement. “That’s my position.”

Reach Bryan Lowry at 785-296-3006 or blowry@wichitaeagle.com (<mailto:blowry@wichitaeagle.com>). Follow him on Twitter: [@BryanLowry3](https://twitter.com/BryanLowry3) (<https://twitter.com/BryanLowry3>).

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Brief opposing Taylor’s ballot withdrawal filed by father of Brownback campaign staffer (<http://www.kansas.com/news/politics-government/article2120909.html>)

Read a Twitter recap from Kansas Supreme Court’s hearing of Taylor v. Kobach (<http://www.kansas.com/news/local/article2123478.html>)