IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
CIVIL COURT DEPARTMENT

DAVID OREL,	)	
Petitioner,	)	
	)	
vs.	)	
	)	
KANSAS DEMOCRATIC PARTY;	)	
JOAN WAGNON, in her official capacity as Chair of the Kansas Democratic Party;	)	**Case No. 2014-CV-958**
LEE KINCH, in his official capacity as Vice Chair of the Kansas Democratic Party;	)	**Three-Judge Panel**
and JASON PERKEY, in his official capacity as Executive Director of the Kansas Democratic Party.	)	**Division No. 6**
Respondents.	)	

BRIEF OF *AMICUS CURIAE* STATE OF KANSAS

The State of Kansas hereby provides this *amicus curiae* brief on the subject of interpreting the State's election statutes.

INTEREST OF THE STATE OF KANSAS AS *AMICUS CURIAE*

The State of Kansas has two strong and concrete interests in the outcome of this litigation, and urgently needs a resolution of this dispute.

First, the State has an interest in having the November 4, 2014, general election conducted in an efficient and orderly manner. The efficient and orderly conduct of the election requires that ballots for use in the election be accurately prepared, printed and distributed in time to meet various deadlines in advance of the election. In order for accurate ballot preparation to

occur, election officials, including the Secretary of State, must know with certainty what names must appear on the ballot as nominees for various offices. The circumstances surrounding this case have resulted in legal uncertainty about what name, if any, should appear on the ballot as the nominee of the Democratic Party for United States Senator. The critical and urgent need for judicial determination of this matter has been presented to this Court by the Secretary of State, the State's chief election officer who is responsible for performing required duties in the preparation of ballots for the election, in the Motion to Intervene and Motion to Expedite filed September 24, 2014. A timely resolution of this litigation is required to avoid injecting additional uncertainty and potential confusion into the election process.

Second, the State has a strong interest in having its laws interpreted correctly and as the legislature intended. *Cf. State v. Skolaut*, 286 Kan. 219, 224, 182 P.3d 1231 (2008) (accepting appeal by State on "matters of statewide interest important to the correct and uniform administration of the criminal law and the interpretation of statutes") (internal quotation marks and citation omitted).

Furthermore, Kansas Attorney General Derek Schmidt is a State constitutional officer and has the statutory and common law authority to represent the State of Kansas in litigation. *See* Kan. Const. Art. 1, § 1; K.S.A. 2014 Supp. 75-702. The Office of the Attorney General has previously participated as an *amicus* in litigation surrounding the interpretation of election statutes. *See, e.g., McCraw v. City of Merriam*, 271 Kan. 912, 26 P.3d 689, 690 (2001) (Office of Attorney General filed *amicus curiae* brief in lawsuit concerning whether city election was required before approval of building expansion project).

BACKGROUND

This case centers on the interpretation of the election statutes of the State of Kansas. These statutes are intended to provide for an orderly election process, including both primary elections and general elections.

As a result of the Kansas Supreme Court's ruling in *Taylor v. Kobach*, No. 112,431, 2014 WL 4638981 (Kan. Sup. Ct. Sept. 18, 2014), there is now a vacancy on the ballot for the Democratic Party nomination for United States Senator for Kansas. On August 5, 2014, Chad Taylor won the Democratic Party primary nomination for United States Senator. *Id.* at *3. According to the official election results as posted on the website of the Kansas Secretary of State, Taylor received 35,067 votes (53.2%) while his primary opponent, Patrick Wiesner, received 30,752 votes (46.7%). (http://www.kssos.org/elections/14elec/2014_Primary_Election_Results_OFFICIAL.pdf). However, on September 3, 2014, Taylor sent a letter asking to withdraw from nomination for election, and the Supreme Court in *Taylor* ordered that Secretary of State Kris Kobach not include Taylor's name on any ballots for the office of United States Senator for the general election on November 4, 2014. *Taylor* at *6.

Although the Supreme Court ordered that Taylor's name shall *not* appear on the ballot, it declined the request of the Secretary of State to decide whether another person's name *should* appear instead. *See Taylor*, at *6 ("Nor do we need to act on Kobach's allegation that a ruling for Taylor would require the Kansas Democratic Party State Committee to name his replacement nominee per K.S.A. 25-3905."). Immediately after that Supreme Court decision, Petitioner filed this mandamus action in the Supreme Court. This case presents the Court with this question of urgent statewide importance: Whether the law requires a name other than Chad Taylor to appear on the ballot as the Democratic Party's nominee for United States Senator or whether no name

must appear. To the best of the knowledge of *amicus,* this case is the only pending litigation that invites judicial determination of that question. The timely answer to that question, in turn, will provide Kansas election officials with the information required to accurately prepare the ballots for this election. The Supreme Court has transferred this case to this Court per Supreme Court Rule 9.01(b). Order, No. 112,487 (Sept. 24, 2014).

Timely resolution of the fundamental question presented by this action – whether ballots should be left blank or should instead include a name at the position of Democratic Party nominee for United States Senator – will provide Kansas election officials with information they need to accurately prepare the ballots. Conversely, in the absence of a timely, definitive judicial determination of this matter, Kansas election officials are left to apply their own uncertain judgment as to whether a name should appear as the Democratic Party's nominee for United States Senator, a judgment that could be subject to after-the-fact judicial review. Evidence of that legal and administrative uncertainty is the action already taken by the Secretary of State. Secretary Kobach has notified county election officers that he has certified the list of candidates with no name appearing as the Democratic Party's nominee for United States Senator, but has advised those officials to prepare only a small number of such ballots (as required for distribution pursuant to the deadlines of the federal Uniformed and Overseas Civilians Absentee Voting Act ("UOCAVA")) in case circumstances change. Secretary Kobach has also directed county election officials to include with such ballots a notice that a recertification may occur later and that if it does a second (and different) ballot will be distributed to those voters. *See* Secretary of State's Motion to Intervene, Exhibit B-3.

The State respectfully suggests that this sort of uncertainty is inconsistent with the State's strong interest in the conduct of orderly elections and can be avoided by definitive and swift

determination of the important question of statewide importance before this Court. It is far better to know now, not later, what the definitive answer is.

DISCUSSION

This case presents a question of statutory construction. The relevant statute is K.S.A. 25-3905(a), which provides:

> **25-3905. Vacancies after primary election filled by party committee or district convention; governor and lieutenant governor vacancies filled by state party delegate convention.** (a) When 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, except if the vacancy is in a party candidacy for a district office or for the office of member of the state board of education, it shall be filled by district convention held as provided in K.S.A. 25-3904, and amendments thereto, or as provided in K.S.A. 25-3904a, and amendments thereto, and except as otherwise provided in subsection (c). Such convention shall be called within 10 days of receipt of the notice that the vacancy has occurred or will occur. If only one political party nominates a candidate at the primary election and thereafter a vacancy occurs in such party candidacy, any political party may fill such vacancy in the manner specified in this section.

"Interpretation of a statute is a question of law, and it is a function of [the] court to interpret statutory language to give it the effect intended by the legislature." *Wilson v. Sebelius*, 276 Kan. 87, 92, 72 P.3d 553 (2003). On issues of statutory construction, the Supreme Court has further explained:

> [T]he best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language they have used. If the makers' language is plain and unambiguous, there is no need to use canons of construction or legislative history or other background considerations to construe the legislature's intent.

Taylor, 2014 WL 4638981, *4 (citations omitted). Furthermore, where construction of election statutes are concerned, the public interest favors constructions that ensure that elected offices are filled. *See Rogers v. Shanahan*, 221 Kan. 221, 227, 565 P.2d 1384 (1976) ("While matters of public policy are for the legislature, we would also note that the construction we have given

K.S.A.1975 Supp. 46-143 does have a beneficial effect favoring public interest. It is the accepted view that it is in the public interest for an elected office to be filled, and for the member-elect to exercise all the rights, responsibilities and duties of his office until the appropriate authority decides otherwise."). That same logic suggests that the public interest favors statutory constructions that ensure positions for which elected nominees have been selected, such as the position of the Democratic Party's nominee for United States Senator, are filled.

According to the Kansas Supreme Court, the legislature's use of the word "shall" in a statute is sometimes mandatory and sometimes not. *State v. Raschke*, 289 Kan. 911, 914-15, 219 P.3d 481 (2009) ("[P]rior decisions of [the Supreme Court] have interpreted the legislature's use of the word 'shall' in some contexts as mandatory and in other contexts as merely directory. Its meaning is not plain, and construction is required."). *See, e.g., State v. Johnson*, 286 Kan. 824, 850, 190 P.3d 207 (2008) (statute requiring judge to state on the record reasons for departure from presumptive sentence was "directory rather than mandatory"); *Nguyen v. IBP, Inc.*, 266 Kan. 580, 583, 972 P.2d 747 (1999) (statute requiring administrative law judge to issue award within 30 days from case submission "is directory only, not mandatory"); *State v. Deavers*, 252 Kan. 149, 165-68, 843 P.2d 695 (1992) (statute requiring notice by State to defendant at time of arraignment of intention to request mandatory prison term held to be mandatory); *Lambert v. Unified School District*, 204 Kan. 381, 382-84, 461 P.2d 744 (1969) (statute requiring 21-day notice prior to special election held to be mandatory). Accordingly, the Supreme Court directed that:

> [T]he following factors are among those to be considered in determining whether the legislature's use of 'shall' makes a particular provision mandatory or directory: (1) legislative context and history; (2) substantive effect on a party's rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provision, *e.g.*, elections or notice on charges for driving under the influence.

Raschke, 289 Kan. at 921. *Accord Gannon v. State*, 298 Kan. 1107, 1147, 319 P.3d 1196 (2014) (citing *Raschke*). Not all of the factors must favor a mandatory construction to conclude that such a construction was intended. *See Raschke*, 289 Kan. at 921-22. Applying the factors here, on balance, they favor a mandatory construction.

First, the legislative context of the provision tends to show that the legislature intended "shall" in this case to be mandatory. In the same sub-section but on different matters related to filling ballot vacancies, the legislature used "shall" in some parts and used "may" in others. Specifically, in the situation where "only one political party nominates a candidate at the primary election and thereafter a vacancy occurs in such party candidacy," the legislature did not mandate any action, choosing instead to provide that "any political party *may* fill such vacancy in the manner specified in this section." K.S.A. 25-3905(a) (emphasis added). But in the statutory provision applicable to the present case, the legislature provided that "such vacancy *shall* be filled by the party committee of the . . . state . . . ." K.S.A. 25-3905(a) (emphasis added). Plainly, the legislature could have used "may" throughout this subsection if it intended to allow discretion but it chose not to, thereby suggesting that different meanings were intended in the mandatory sentence ("shall") and the non-mandatory sentence ("may"). As for the legislative history of this section, under the time constraints presented by this case, this Office investigated the legislative history and did not identify anything that would further clarify this matter beyond what the plain language suggests. Section 25-3905(a) was amended three times since its original passage in 1972, and none of the amendments reveal any particular intent concerning the provision at issue. The specific statutory language at issue in this case also existed in a predecessor section, K.S.A. 25-220, which was enacted in 1908 in nearly the same form as it exists today, and remained unchanged until re-codified as section 25-3905(a). 1908 Kan. Sess.

Laws, Ch. 54, § 16 ("Vacancies occurring after the holding of any primary shall be filled by the party committee of the city, subdistrict, county, or state, as the case may be.").

Second, section 25-3905(a) is substantive rather than procedural, which favors a mandatory construction. "[I]t is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory . . . ." *City of Hutchinson v. Ryan*, 154 Kan. 751, Syl. ¶ 1, 121 P.2d 179 (1942). By contrast, "where the provision fixes a mode of proceeding and a time within which an official act is to be done and is intended to secure order, system and dispatch of the public business, the provision is directory." *Id.* Here, the provision is intended to ensure a full ballot for consideration by the voters at the general election, which is consistent with, and furthers the purpose served by, a primary election that produced a party candidate. *Cf. Rogers*, 221 Kan. at 229 ("it is in the public interest for an elected office to be filled").

The third factor, the existence or nonexistence of consequences for noncompliance, is not definitive here. The Supreme Court has explained that:

> It can safely be said that the legislature does not intend any statutory provision to be totally disregarded. So, when the consequences of not obeying a particular statute are not prescribed by the legislature . . . the court must decide the consequences. In determining the consequences of failure to comply with a statute courts necessarily consider the importance of the literal and punctilious observance of the provision in question with regard to the ultimate object which the legislature sought to serve.

City of Kansas City v. Board of County Comm'rs, 213 Kan. 777, 783, 518 P.2d 403 (1974) (citing 2A Sutherland Statutory Construction (4th Edition), s. 57.01, p. 412). While the statutory sub-section here sets forth no consequences for noncompliance, it is clear that the failure to comply at all or in a timely fashion creates uncertainty in the general election process – as has happened in this case. The absence of statutorily expressed consequences should not transform

this provision into an optional request and certainly does not deny this Court authority to enforce the duties imposed by law.

Finally, the subject matter here is elections, which favors a mandatory construction. *See Raschke*, 289 Kan. at 918 (collecting election notice and time provision cases holding "shall" provisions were mandatory). *See, e.g., Lambert*, 204 Kan. at 383 ("'statutory provisions for notice of a special election are mandatory'") (quoting *Baugh v. Rural High School Dist. No. 5, Linn County*, 185 Kan. 123, 124, Syl. ¶3, 340 P.2d 891 (1959)); *City of Wichita v. Robb*, 163 Kan. 121, 124, 179 P.2d 937 (1947), *superseded by statute on other grounds as stated in State ex rel. Johnson v. Schmidt*, 182 Kan. 593, 595, 322 P.2d 772 (1958) ("provisions for notice of the time and place of an election are mandatory"). All together, these factors weigh in favor of treating the "shall" in section 25-3905(a) as mandatory.

One final point deserves mention. While we are not aware of any directly on-point precedent interpreting the meaning of the language in this statutory section, this language has been referred to in one case and one Attorney General Opinion. Neither of these squarely addressed the question presented in this case. In *Koehler v. Beggs*, 121 Kan. 897, 250 P. 268 (1926), the Supreme Court was faced with a question of whether a person was entitled to be placed on the ballot as the Democratic candidate when no Democratic candidate had appeared on the primary election ballot. *Id.* In discussing the mechanics of how the process might unfold under different circumstances, the Court referred to K.S.A. 25-220 (the predecessor to 25-3905(a)), stating that "If, after the [primary election] law has been fulfilled, vacancies occur in those [primary election] nominations, the party committee may then fill them with substitutes." *Id.*, 250 P. at 271. Because no Democratic candidate had been selected in a primary election, there was no vacancy to be addressed, and the Court had no occasion to interpret whether the

statutory language was mandatory. The quoted passage referring to the statute was unnecessary for the decision, and it is well-established that an unnecessary statement is dictum and "lacks the force of an adjudication." *State v. Fortune*, 236 Kan. 248, 251, 689 P.2d 1196 (1984) (citing Black's Law Dictionary 541 (Rev. 4th Ed. 1968)).

One Kansas Attorney General Opinion refers to K.S.A. 25-3905, but that opinion addressed a different question than the one presented here. Attorney General Opinion No. 92-66 addressed the question of "whether the person named as vice-presidential candidate on an independent nomination petition for president and vice-president may be replaced so as to permit a different name to appear on the general election ballot." Kan. Atty. Gen. Op. No. 92-66, 1992 WL 613428 at *1 (May 18, 1992). Although not directly at issue, the opinion generally describes the process for filling a party nomination vacancy (rather than an independent, non-party vacancy) that arises after a primary election: "Therefore, a vacancy which occurs when a person who has received a party nomination for vice-president and subsequently causes such nomination to be withdrawn pursuant to K.S.A.1991 Supp. 25–306b may be filled by the party committee of the state provided the vacancy occurs after a primary election." *Id.* at *3. While the paraphrasing refers to the process in a permissive manner, the Attorney General was not being called upon to determine whether a party committee owes a duty to nominate a replacement to fill a post-primary election vacancy. Neither of these authorities resolves the question presented to this Court, and *amicus* therefore believes this case presents a question of first impression as to the meaning of the specific statutory provision at issue.

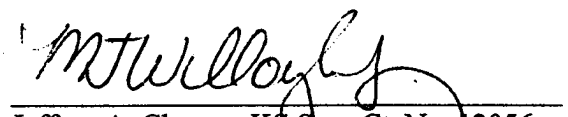
CONCLUSION

Based on the foregoing analysis, the State of Kansas respectfully requests that this Court quickly reach the merits of the question presented in this case and provide certainty upon which

election officials can rely in preparing ballots. As demonstrated above, it is requested that this Court conclude and declare that K.S.A. 25-3905(a) imposes a mandatory duty on the Respondents fill the vacancy on the ballot for United States Senator in time for the State to conduct an orderly general election on November 4, 2014, in compliance with state and federal law.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT



Jeffrey A. Chanay, KS Sup. Ct. No. 12056
Chief Deputy Attorney General
Christopher M. Grunewald, KS Sup. Ct. No. 23216
Assistant Attorney General
M. J. Willoughby, KS Sup. Ct. No. 14059
Assistant Attorney General
Burke W. Griggs, KS Sup. Ct. No. 22805
Assistant Attorney General
Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215 / Fax: (785) 291-3767
E-mail: jeff.chanay@ag.ks.gov
chris.grunewald@ag.ks.gov
mj.willoughby@ag.ks.gov
burke.griggs@ag.ks.gov

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing was served by depositing same in the United States Mail, first class postage prepaid, and by electronic means, the 26th day of September 2014, to:

Thomas D. Haney
STEVENS & BRAND, LLP
917 SW Topeka Blvd
Topeka, Kansas 66612

Counsel for Petitioner

Randall K Rathbun
DEPEW GILLEN RATHBUN &
MCINTEER LC
8301 E. 21st Street N., Suite 450
Wichita, Kansas 67206-4000

Counsel for Defendants

With a courtesy copy delivered to proposed intervenor Kris Kobach, in his official capacity as Kansas Secretary of State:

Thomas E. Knutzen
Kansas Secretary of State's Office
120 S.W. 10th Avenue
Topeka, KS 66612

Bradley J. Schlozman
Hinkle Law Firm LLC
301 North Main Street, Ste. 2000
Wichita, KS 67202

And Chambers' copies delivered as per Local Rule.

M.J. Willoughby