

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

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KS. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

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DAVID OREL,

Petitioner,

vs.

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.

Case No. 14-CV-958
Three-Judge Panel

MEMORANDUM OPINION AND ENTRY OF JUDGMENT

NATURE OF THE CASE:

The Kansas Supreme Court's Order of September 23, 2014 summarizes the nature of the case thus far:

On September 18, 2014, this court granted Chad Taylor's original petition for writ of mandamus seeking to compel Kris Kobach, Kansas Secretary of State, to not include Taylor's name on the ballots as the Democratic Party candidate for the office of United States Senator in the November 4, 2014, general election.

Later that day, David Orel filed an original petition for writ of mandamus and memorandum in support seeking to compel the 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 (the Respondents), to name a Democratic Party candidate whose name and party affiliation would appear on the ballots for the office of United States Senator in the November 4, 2014, general election.

Orel contends relief in mandamus is appropriate because the Respondents have a clear duty under K.S.A. 25-3905(a) to name a candidate to replace Taylor. He urges this court to grant his petition and compel Respondents to immediately name a replacement because of a federal statutory deadline requiring ballots to be mailed to members of the armed forces and civilians living overseas 45 days before the general election.

According to Orel, that deadline originally fell on September 20, 2014. But Orel filed a Supplemental Notice on September 22, alleging that Kobach had extended the deadline for mailing overseas ballots. . . .

The Kansas Supreme Court transferred the case to this Court in order to make findings of fact. The Supreme Court noted that Mr. Orel's filings lacked the sworn evidence "necessary to enable this court to make any of a myriad of legal determinations, including, but not limited to, ripeness, the nature of the parties, the existence of standing, and the propriety or adequacy of the mandamus relief requested."

Subsequently, as noted Secretary Kobach filed a Motion to Intervene as Petitioner, a Motion to Expedite the case, and for Judgment on the Pleadings. In the Motion to Expedite, Secretary Kobach represented that, "In order to allow the counties to prepare and transmit those ballots, the Respondents must fill the vacancy for the Democratic nomination for the office of United States Senator no later than 2:00 p.m. on October 1, 2014." In response to this Motion, and pursuant to a case management conference held on September 25, 2014, this Court entered a Case Management Order that established a rigorous briefing schedule, and set the case for an evidentiary hearing and oral argument on September 29, 2014. The Petitioner failed to appear at the evidentiary hearing despite the Court's direction, which mandated the appearances of witnesses that were requested by the other parties. Due to the Petitioner's failure to appear, no evidence was presented.

STATEMENT OF FACTS

1. Mr. Orel represents, in his pleadings, that he 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.
2. Respondents are the Kansas affiliate of the National Democratic Party and the officers of the Kansas Democratic Party.
3. Kris Kobach is the Kansas Secretary of State.
4. Following his victory in the August 5, 2014 Democratic Primary, Chad Taylor became the Democratic nominee for U.S. Senate.
5. On September 3, Mr. Taylor submitted a letter to the office of Secretary Kobach, in which he attempted to withdraw from the race “pursuant to K.S.A. 25-306b(b).” Secretary Kobach refused to remove Mr. Taylor’s name from the ballot. The procedural facts surrounding the litigation that ensued may be found in *Taylor v. Kobach*, ___ Kan. ___, ___ P.3d ___ (Case No. 112,431, filed September 18, 2014), and do not bear repetition in their entirety here.
6. On September 18, 2014, the Kansas Supreme Court granted Mr. Taylor’s Petition for Writ of Mandamus, and Mr. Taylor’s name was subsequently taken off of the ballot.
7. On September 18, 2014, Mr. Orel filed this Petition for Writ of Mandamus with the Kansas Supreme Court.
8. On September 23, 2014, the Kansas Supreme Court transferred the case to this Court for the reasons set forth earlier.
9. An evidentiary hearing and oral arguments were scheduled for September 29, 2014. However, at the time scheduled for the expedited hearing and trial of this matter and only after his counsel had been told to proceed did his counsel advise that Mr. Orel had

refused to appear notwithstanding his availability as a witness had been assured and pursuant to the Court's order his presence at the hearing was required.

10. No affidavits have been received in this matter, beyond those filed in the *Taylor v. Kobach* litigation and those attached to the Secretary's Motion to Intervene, none of which affirm factually the allegations as to his standing as averred in his *Petition*.

STANDARD OF REVIEW

A. Motion to Intervene

Motions to Intervene are governed by K.S.A. 60-224, which provides as follows:

(a) *Intervention of right*. On timely motion, the court must permit anyone to intervene who:

(1) Is given an unconditional right to intervene by a statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter substantially impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) *Permissive intervention*.

(1) *In general*. On timely motion, the court may permit anyone to intervene who:

(A) Is given a conditional right to intervene by a statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a government officer or agency*.

(A) On timely motion, the court may permit a governmental officer or agency to intervene if a party's claim or defense is based on:

(i) A statute or executive order administered by the officer or agency; or

(ii) any regulation, order, requirement or agreement issued or made under the statute or executive order.

(B) When the validity of an ordinance, regulation, statute or constitutional provision of this state or a governmental subdivision of this state is drawn in question in any action to which the state or governmental subdivision or an officer, agency or employee thereof is not a party, the court may notify the chief legal officer of the state or its subdivision, and permit intervention on proper application.

(3) *Delay or prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

K.S.A. 60-224(a) is to be “liberally construed to favor intervention.” *Smith v. Russell*, 274 Kan. 1076, 1083, 58 P.3d 698 (2002). Nevertheless, “Intervention as a matter of right is subject to the same mixed determination of law and fact as is joinder. . . . Permissive intervention lies within the discretion of the district court.” *Landmark Nat. Bank v. Kesler*, 289 Kan. 528, 533, 216 P.3d 158 (2009). However, “the right to intervene under K.S.A. 60–224(a) depends on the concurrence of (1) a timely application, (2) a substantial interest in the subject matter, and (3) a lack of adequate representation of the intervenor's interests.” *Montoy v. State*, 278 Kan. 765, 767, 102 P.3d 1158 (2005). The absence of any of these three requirements precludes a party’s right to intervene. *Cf.* 278 Kan. at 768.

When issues of standing are raised, a party bears the burden of demonstrating that it has standing to intervene in a case. *Ternes v. Galichia*, 297 Kan. 918, 921, 305 P.3d 617 (2013) (“The appellant lawyers must demonstrate standing both to intervene and to appeal.”); contra *McDaniel v. Jones*, 235 Kan. 93, 106–07, 679 P.2d 682 (1984) (To avoid intervention, “the opposing party has the burden of showing the applicant's interest is adequately represented by the existing parties.”). As the Kansas Supreme Court has written, “In order to establish standing,

a party must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling.” *Ternes v. Galichia*, 297 Kan. at 921.

B. Petition for Writ of Mandamus

As set out in K.S.A. 60-801, “Mandamus is a proceeding to compel some . . . corporation or person to perform a specified duty, which duty results from . . . operation of law.” K.S.A. 60-801. As the Kansas Supreme Court very recently summarized:

‘[M]andamus is a proceeding designed for the purpose of compelling a public officer to perform a clearly defined duty, one imposed by law and not involving the exercise of discretion.’ [Citations omitted.] And ‘[u]nless the respondent's legal duty is clear, the writ should not issue.’ [Citations omitted.] ‘Whether mandamus lies is dependent upon an interpretation of the applicable procedural and substantive statutes, over which this court has unlimited review.’ [Citations omitted.] The petitioner has the burden of showing a right to such relief. [Citations omitted.]

Taylor v. Kobach, Slip Op. at 5.

This earlier quote from *Taylor* was appropriate to the case from which it arises, however, mandamus, as a remedy may be employed more broadly. The Kansas Statute states:

“Mandamus is a proceeding to compel some 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.”

K.S.A. 60-801.

As can be noted from the text, mandamus is employable as well against a corporate entity and only in the case of great emergency or exigency does a court interfere in the intended affairs of a corporation and, as with any mandamus action, the duty sought to be enforced must be clear and unequivocal or the corporation must be willfully abusing a discretionary power, acting in bad faith, neglecting a mandatory duty, perverting the corporate purpose or committing a fraud

or breach of trust. *Cron v. Tanner*, 171 Kan. 57, 62, 64 (1951). The Kansas Democratic Party is, apparently, and as alleged, a non-for-profit corporation or, in the least, a recognized and special association.

As applied to private citizens, the propriety of a writ of mandamus is limited. As the Kansas Supreme Court has written:

While mandamus will not ordinarily lie at the instance of a private citizen to compel the performance of a public duty, it has been held where an individual shows an injury or interest specific and peculiar to himself, and not one that he shares with the community in general, the remedy of mandamus and the other extraordinary remedies are available. [Citations omitted.]

Whether or not a private individual has brought himself within the narrow limits of the well-established rule must be determined from the particular facts of each individual case. [Citations omitted.]

Kansas Bar Ass'n v. Judges of Third Judicial Dist., 270 Kan. 489, 491, 14 P.3d 1154 (2000).

When a private citizen seeks a writ of mandamus, the proper inquiry is: "Have plaintiffs shown some injury or interest specific and peculiar to themselves and not one that they share with the community in general?" *Stephens v. Van Arsdale*, 227 Kan. 676, 683, 608 P.2d 972 (1980) (finding that plaintiffs, who collected and sold news to the citizens of Kansas and were specifically deprived of access to the courts, had demonstrated the requisite standing to maintain a mandamus action).

In considering the Secretary's Motion to Intervene, however, it becomes necessary to distinguish a mandamus action brought by a government officer from the previously stated limitations on private citizens. Again, the Kansas Supreme Court has addressed this issue:

[T]he standing requirement is less stringent in some actions sounding in mandamus. This is not so when a private person brings an action in mandamus; in such a case, there must be a showing of actual, specific, and peculiar injury. [Citations omitted.] When actions are brought on relation

of the attorney general or another government officer, however, there is no requirement of actual injury. [Citation omitted] In such a case, it must be shown: (1) there is a question relating to a specified duty imposed by law and not involving discretion; (2) the question must be of great public importance and concern sufficient to warrant the court exercising its discretionary jurisdiction; and (3) the question must arise from an actual controversy, meaning a situation must have arisen which implicates the official's duty. [Citation omitted.]

State ex rel. Morrison v. Sebelius, 285 Kan. 875, 909, 179 P.3d 366 (2008).

CONCLUSIONS OF LAW

A. Motion to Intervene

Before turning to the relief requested in Mr. Orel's Petition, the Court would first consider the Secretary's Motion to Intervene. The Secretary argues that he must be permitted to intervene, as a matter of right, under K.S.A. 60-224(a)(2). In the alternative, he argues that the Court should permit him to intervene under K.S.A. 60-224(b)(2). The Court considers both arguments in turn.

The Secretary argues that his "interest" in this litigation arises out of a number of duties assigned to his office. First, Secretary Kobach cites his "duty to certify to county election officers the names of the persons to appear on the ballot for the November 4, 2014, general election" pursuant to K.S.A. 25-311. Secretary Kobach notes that he "made his original certification of the names for the ballot on September 19, 2014." However, because there was no Democrat nominee at the time of the Secretary's original certification, the Secretary argues that "The Secretary has the duty to re-certify the name to appear on the ballot for the Democratic nominee for the office of United States Senator once the Kansas Democratic Party has filled the vacancy" pursuant to K.S.A. 25-309 and K.S.A. 25-3905(a).

The Secretary's duty, as he admits, is not yet actually implicated because the Kansas Democratic Party has not named a candidate to fill the vacancy left by Mr. Taylor's withdrawal. The plain language of K.S.A. 25-309 confirms the conditional nature of the Secretary's duty under that statute:

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. [Emphasis added]

Plainly, before the Secretary's duty to re-certify actually arises, a party committee must have filed a certificate of nomination with the Secretary. This is a necessary prerequisite; without a replacement candidate, the Secretary has no duty to re-certify such a candidate. Accordingly, any "interest" the Secretary may have is not yet "concrete, particularized, and actual or imminent[.]" *Ternes v. Galichia*, 297 Kan. at 921.

Thus, there is no certainty whatsoever about whether or not the Secretary will actually be required to carry out the conditional duty assigned to him by K.S.A. 25-309. The nature of the "interest" articulated by the Secretary, then, is purely hypothetical; insofar as the Court is aware, he is, as of now, in full compliance with his statutory duties and he has declared his intention to follow through with any in the future. Only in the event that the Respondents decide to nominate a replacement candidate to fill the vacancy left by Mr. Taylor's withdrawal or this Court orders that be done would any additional duties arise and, accordingly, provide the Secretary with a substantial interest in this case. *Cf. State ex rel. Stephan v. Kansas Dep't of Revenue*, 253 Kan. 412, 420, 856 P.2d 151 (1993) ("the problem with this claim is that it is academic and not

supported by the record on appeal, which contains no allegations concerning any particular county or county appraiser. Until some action is taken against a particular county or county official, the proposed intervenors are not affected parties and do not have a substantial interest in the subject matter of this case. County officials will have a remedy if and when action is taken against them.”). But until then, the Secretary’s official duties are not implicated in the decision to nominate—or not to nominate—a replacement candidate.

The only remaining interest available to the Secretary is that he has an opinion that comports with that of the Petitioner, Mr. Orel. The Secretary is concerned with the interpretation of Kansas election statutes, this much is true. However, as addressed above, none of the Secretary’s duties are actually yet at issue in this litigation, and it is unclear how he has any more entitlement to a proper legal interpretation of Kansas election laws than any other citizen. It is beyond question that “[p]ermissive intervention lies within the discretion of the Court.” *Landmark Nat. Bank v. Kesler*, 289 Kan. at 533. As such, the Court denies the Secretary’s Motion to Intervene, either as a matter of right or as a matter of the Court’s permission, until an actual duty arises—at which time, the Court would reconsider the Motion. Otherwise, his principal interest is in the expedition of a decision in this suit, which the Court is accommodating or in a potential remedy ordered by this Court requiring his involvement. None of his interests pertain to the merits of the suit such that party status need be granted him. He has no stake in the answer itself in his capacity as Secretary of State, only the timely need for an answer. Further, here the Secretary has brought suit on the basis of his public office. However, the Office of Secretary of State has been given no authority to sue. See K.S.A. 75-401 *et seq.* Here, he sought to enforce a perceived duty on the Respondents. The Secretary of State can deploy no enforcement powers, for lack of a better word, *pro se*. Kansas’s constitutional chief law

enforcement is the Kansas Attorney General and is the one to bring “*ex rel*” lawsuits on behalf of the State for governmental entities without the power to sue. *Bobbett v. State*, 10 Kan 9 (1872). We note this only, but here need not decide its effect.

Having thus decided the question of the Secretary’s Motion to Intervene adversely to him, his Motion for Judgment on the Pleadings is not before us.

B. Petition for Writ of Mandamus

The justiciability of this suit must first be considered. If justiciability can not be established, the Court’s inquiry need not proceed any further. *Gannon v. State*, 298 Kan. 1107, 1118, 319 P.3d 1196 (2014) (“the State raises the issue of nonjusticiability. If the State prevails on this threshold matter, we do not reach the merits of plaintiffs’ claims and plaintiffs’ claims and the case is dismissed.”) Kansas’s justiciability requirements are as follows:

As part of the Kansas case-or-controversy requirement, courts require: (a) parties must have standing; (b) issues cannot be moot; (c) issues must be ripe, having taken fixed and final shape rather than remaining nebulous and contingent; and (d) issues cannot present a political question. [Citations omitted.] This court has noted the constitutional dimension’ of these requirements which have the effect of requiring all plaintiffs and petitioners to meet the threshold burden of making “out a case or controversy between himself and the defendant. [Citations omitted.]

State ex rel. Morrison v. Sebelius, 285 Kan. at 896–97.

Standing is the relevant issue. In order for a private citizen to have standing in a mandamus action, the individual must demonstrate “an injury or interest specific and peculiar to himself, and not one that he shares with the community in general[.]” *Kansas Bar Ass’n v. Judges of Third Judicial Dist.*, 270 Kan. at 491 (quoting *Stephens v. Van Arsdale*, 227 Kan. at 683). The burden is on Mr. Orel to demonstrate his standing. *Gannon v. State*, 298 Kan. at 1123. As our state supreme court has written, “[T]he nature of [the burden to prove standing] depends

on the stage of the proceedings because the elements of standing are not merely pleading requirements. Each element must be proved in the same way as any other matter and with the degree of evidence required at the successive stages of the litigation.” *Gannon v. State*, 298 Kan. at 1123. In a civil matter, a party asserting standing must establish standing by a preponderance of the evidence, i.e., that “a fact is more probably true than not true.” *Gannon v. State*, 298 Kan. at 1124. Because standing is a component of subject matter jurisdiction, it may be raised at any time, by any party to a case—or by the Court itself. *Sierra Club v. Moser*, 298 Kan. 22, 29, 310 P.3d 360 (2013).

Here, Mr. Orel failed to attend the evidentiary hearing set by this Court on September 29, 2014. He has presented no sworn affidavit for the Court’s consideration, and has not signed any of the pleadings filed on his behalf and there have been no stipulations entered. As such, the Court is without any evidence whatsoever with which to make a determination as to Mr. Orel’s standing to maintain a mandamus action. His attorney argues that Plaintiff’s pleadings are uncontested. However, here because the matter was expedited, a case management conference held, and a Case Management Order entered, all in an effort to speedily advance this case, no answer was mandated and only briefings were invited. Mr. Orel was placed on notice his testimony was needed. By refusing to attend the proceedings and to present any evidence for the Court’s consideration, Mr. Orel has failed to carry his burden of establishing his standing to maintain a mandamus action. However, because of the legal representations of his counsel that the pleadings stood as an adequate base, we deferred a decision subject to review of that issue. However, this Court now finds that Mr. Orel has failed to adequately support his Petition for Writ of Mandamus and dismisses it for failing to provide evidence to sustain it. Further, because the judgment on the Respondent’s motion to dismiss for want of this available proof was

reserved for the written opinion of this Court, the Respondents orally moved alternatively for judgment on the pleadings. Similarly, out of caution, we address that latter motion here.

Even assuming that everything Mr. Orel's Petition states is true—an assumption which, absent any evidence, this Court cannot reliably make—an evaluation of Mr. Orel's Petition demonstrates that he would still lack standing, particularly for the remedy he seeks. In a letter attached to his Memorandum in Support of his Petition for Writ of Mandamus, Mr. Orel's counsel asserts that Mr. Orel "intends to vote for the Democratic Party's candidate for U.S. Senate in the general election." At oral arguments, Mr. Orel's counsel stressed that this claim formed a specific and particular injury which was not shared with the general public.

The Court disagrees. Undoubtedly there are many citizens who share such an interest, and they may well not be limited to Democrats only, but that does not demonstrate an injury or interest *specific and peculiar* to Mr. Orel. Put simply, if Mr. Orel has been "harmed," it is the exact same "harm" affecting all other citizens of Kansas who have registered to vote and intend to vote: he cannot vote for a Democrat nominee at the general election. Frustrating, perhaps, but not of the substance for a mandamus claim without more, which "more" we will discuss later.

Even if the Court were to conclude that Mr. Orel had standing to bring a Petition for Mandamus, it would still be improper to issue a writ of mandamus in this case. As noted above, a writ of mandamus is only proper if the Respondents' legal duty is "clearly defined, imposed by law, and [does not involve] the exercise of discretion." *Taylor v. Kobach*, Slip. Op. at 5 (quoting *State ex rel. Slusher v. City of Leavenworth*, 279 Kan. 789, Syl. ¶ 4, 112 P.3d 131 (2005)). Similarly, when that remedy is sought against a corporation, some clear abuse of a clear duty must exist. *Cron v. Tanner*, *supra*.

Mr. Orel posits that the Respondents, pursuant to K.S.A. 25-3905(a), have a “clearly defined” legal duty to nominate a replacement candidate, based solely on the use of the word “shall” in the statute: “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” (Emphasis added.) We would agree that the corporate or associational entity that is the Democratic Party of Kansas is governed by the Kansas election laws and that if the duty opined by the Petitioner existed, then deeper inquiry into Mr. Orel’s asserted grounds for standing would be warranted, had he not frustrated that opportunity by his nonappearance. But both that default and the proper and reasonable construction to be given the statute cited stand to halt further inquiry.

The Petitioner does, as did the Secretary of State, cling to the single word “shall” and then end their inquiry. In *Koehler v. Beggs*, 121 Kan. 897 (1926) in regard to the meaning of the word “occurring” that was used in the statute that was an early predecessor, in part, to what is now K.S.A. 25-3905(a), the Court stated:

The fault in plaintiff’s presentation of the question for decision lies in its method. He finds a legitimate meaning of a word in a dictionary, which suits his purpose, adopts that meaning, and from that meaning proceeds to deduce a legislative act. The result is his pyramid stands on its apex and not on its base, and his authorities are not persuasive.

Id. 898–99.

The use of the word “shall” in legislation, however, “is not plain, and construction is required.” *State v. Raschke*, 289 Kan. 911, 914–15, 219 P.3d 481 (2009); see also James Concannon, *Civil Code and Time Computation Changes Effective July 1*, 79-June J. Kan. B.A. 20, at 21 (2010) (discussing problems with use of the word “shall”). Black’s Law Dictionary, for instance, provides a full five distinct meanings of the word “shall”:

1. "Has a duty to; more broadly, is required to"
2. "Should (as often interpreted by the courts)"
3. "May"
4. "Will (as a future-tense verb)"
5. "Is entitled to."

Black's Law Dictionary, Eighth Edition, at 1407. Recognizing the uncertainty inherent in the use of the word, the Kansas Supreme Court has provided a list of factors that,

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.

State v. Raschke, 289 Kan. at 921.

K.S.A. 25-3905(a) came into effect in 1972, as a revision and recodification of election laws, among which was then existing K.S.A. 25-220. See Laws 1972, ch. 131, §§ 5, 11. The phrase at issue in K.S.A. 25-3905(a) was then—"Whenever 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". The language remains unchanged, from 1972 except for a subsequent shift in language from "whenever" to the modern "when." As far back as 1908—when then 25-220 came into effect—the statute used the word "shall" as follows: "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." Thus, there has been no shift here in this language.

With this in mind, however, several Kansas cases have previously discussed the meaning of K.S.A. 25-220. In 1926, for instance, the Kansas Supreme Court considered the meaning of R.S. (1923) 25-220, which was then its statutory cite, within the broader question of whether or not a county party committee could name a candidate to fill a vacancy when no nomination had been made at a primary election. *Koehler v. Beggs*, 121 Kan. 897, 250 P. 268 (1926). The language of R.S. 25-220, at the time, read: "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." *Koehler v. Beggs*, 121 Kan. at 902 (quoting R.S. 25-220). As the court wrote,

It is not necessary to indulge in reminiscence or speculation concerning the theory and purpose of the primary election law. The Legislature has declared them in express terms. All candidates for elective offices shall be nominated by a primary. The declaration needs no interpretation. It is unambiguous and compulsory. A primary election shall be held. Ballots containing the names of candidates who have qualified to appear upon them are to be prepared, cast, and counted, with the result that candidates will be nominated. *If, after the law has been fulfilled, vacancies occur in those nominations, the party committee may then fill them with substitutes.* [Emphasis added.]

Koehler v. Beggs, 121 Kan. at 902.

Over a decade and a half later, the Kansas Supreme Court again quoted the *Koehler* decision's analysis with regard to G.S. 25-220 without additional comment. *Dist. Party Comm. of Republican Party of Twelfth Judicial Dist. of Kansas v. Ryan*, 152 Kan. 509, 510, 106 P.2d 261 (1940).

This latter case is an interesting one where a popular judge, Judge Kennett, a Democrat, in the Twelfth Judicial District consisting of Cloud, Republic and Washington Counties had been elected as judge since 1928 and usually he had no opposition nominated from the Republican party. Running again in the 1940 primary, again unopposed from any source, he won the

primary and faced no opposition in the general election. However, on September 3, 1940, he died. The Republicans had not nominated an opponent in its primary out of deference to the good judge. After his death, the party attempted, under the language of K.S.A. 25-220, to nominate a Republican candidate, its reason for abstention apparently having passed with Judge Kennett. A suit in mandamus was brought when the County Clerks refused to accept a Republican party nominee, apparently accepting only a nominee of the Democratic party. The Court held that as the Republicans had advanced no candidate for judge in its primary, then under 25-220, there was no candidacy vacancy for them to fill. The Kansas Supreme agreed with the County Clerks that the Republican party had no candidate vacancy.

In the 1941 session of the Kansas legislature, the following language was added to this long standing statute as shown by italicize:

Provided, That if only one political party nominates a candidate at the primary and thereafter the candidate so nominated dies, declines the nomination or is otherwise ineligible for the office to which he has been nominated, and a vacancy thereby occurs in the nomination, any political party having a state and national organization may nominate a candidate for such office on its party ticket by its party committee of the city, subdistrict, county, district or state, as the case may be.

Sec. L. 1941, ch. 226 1941 Supplement 25-220.

Further, at least two opinions of the Attorney General of Kansas have evaluated K.S.A. 39-3905 in a similar light. See Kan. Att'y Gen. Op. No. 99-1, at *4 (Jan. 15, 1999) ("In Kansas, the county central committees of the political parties are authorized to fill vacancies in party candidacies."); Kan. Att'y Gen. Op. No. 92-66, at *3 (May 18, 1992) ("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.").

Further, K.S.A. 25-307, as it existed before its repeal in 1972, also indicated that failures in candidacy could be permissively filled. Moreover, the Court notes that K.S.A. 25-306b(d) contemplates a situation where, “there has been a vacancy which occurred from a withdrawal under this section, and such vacancy was filled according to law, the person filling the vacancy may cause such person's name to be withdrawn[.]” This, too, supports an inference that “shall,” as used in K.S.A. 25-3905(a), carries a limited reference to the who and how of filling such vacancies, not a mandate to do so. If a substituted nominee may later withdraw at will there seems little imperative to selecting one.

While the Attorney General’s *amicus curae* brief cautions that the exact question currently at issue was not discussed by these prior cases, or particularly by his predecessors’ opinions noted, this Court considers these authorities persuasive. This is particularly true in light of the language at issue’s lineage and preceding legislatures’ adjustments to it. The total absence of any authorities or legislative act that would impute a desire to make mandatory, rather than permissive, the choice to advance a new candidate where misfortune has subsequently fallen to the victor of a primary election is persuasive. The language of this historically discussed statute now appear substantially verbatim in present day K.S.A. 25-3905(a) as that language is shown italicized following:

(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. [Emphasis added]

The Court concludes that the legislative and case history falls in favor of a limitation on the use of the word "shall", in K.S.A. 25-3905(a) to who has the authority to fill a vacancy and/or otherwise how such a vacancy is to be filled. The statutory framework mandates the who and the how, not the whether. Plainly, the only consequence for noncompliance with K.S.A. 25-3905(a) is that a replacement candidate will not be named. There is no enforcement mechanism or punitive consequences to be found anywhere else in the statute any such. The Court concludes that this, too, weighs in favor of not extending a mandatory meaning to K.S.A. 25-3905(a)'s use of the word "shall" to a political party's decision of whether to advance a substitute candidate, or not.

Further, the organizational leaders of recognized political parties in Kansas that hold primaries are democratically elected by a party's registered, yet voluntary, constituents to represent what they believe to be the best interest of their respective political parties in obtaining their vision of proper government. K.S.A. 25-202; K.S.A. 25-3801, *et seq.* As in all matters of human activity, success in any goal rests in the character, stalwartness, and energy of those that are selected to perform the duty or duties assigned or the office sought. By the statute at issue, whether a vacancy in a candidacy is to be filled in the first instance would rest with the elected leadership, in this instance, of the Democrat party, which vacancy was brought about by the withdrawal of its nominee for United States Senate as selected at the earlier primary election.

To advance another candidate for a statewide race that under today's political realities, which in order to be successful, requires enormous financial commitment and implicitly an assist by the nominating party, would be a judgment worthy of great pause before its making. For any

potential candidate, there is also a personal commitment, which is fraught with personal, familial, and practical consequences much deeper than those engendered to mere financial contributors, moral supporters, actual voters, or a sponsoring party. Moreover, a candidate so selected now would be faced with a very time restricted window to successfully advance his or her views.

It would be hard to believe that Kansas legislators, being overwhelmingly derivative of political parties themselves, would intend that a court be ready to intervene by mandamus to mandate such an inherently difficult choice on a duly elected party governing body's decision to pursue, or to forego, the opportunity to fill such a vacancy, a decision, as noted, burdened by the practicalities of proper selection, as set against the time to do so, and the prudent weighing of the probabilities of candidate success or the consequences of action, or inaction, to the political party itself.

For a political party in Kansas subject to the mandatory primary law, as both the Republican and Democratic parties are, it is a potential candidate's choice alone to run in a primary, not that of his or her particular political party. However, when a candidate vacancy occurs after a primary, it is the judgment of the political party as to whether to challenge, or not, for the office by assessing both candidate availability and viability and, as well, its own party's best interests. Thus, the same considerations may not attend the decision of a primary candidate to run and one where the political party organization itself makes the necessary decision.

Here, as our principal opinion above notes, the legal history for the proper context to be placed on this statute and what we believe is its commonsense meaning reflects a discretionary judgment is left to be made by the political party of the withdrawn candidate as to whether a vacancy is to be filled or not. Therefore, mandamus, as a remedy, is simply not appropriate

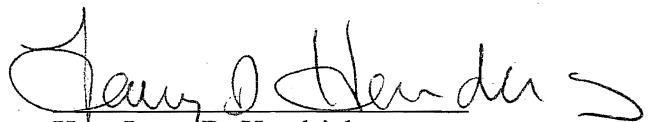
given the discretion, the intrusiveness and the impracticality that giving jurisdictional recognition to the Plaintiff or the relief sought would otherwise demand.

ENTRY OF JUDGMENT

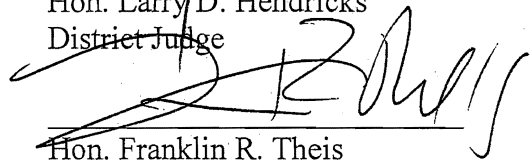
For the reasons stated above, the Court denies Mr. Orel's Petition for A Writ of Mandamus and denies the Secretary of State's Motion to Intervene. Judgment is hereby entered for the Respondents, the Kansas Democratic Party, *et al*, and against the Petitioner, David Orel. Costs are taxed to the Petitioner.

This entry of judgment shall be final when filed with the Clerk of the Court and no further journal entry is required.

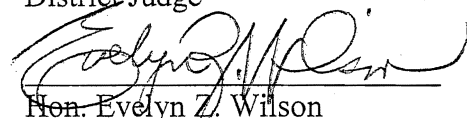
IT IS SO ORDERED this 1st day of October, 2014.



Hon. Larry D. Hendricks
District Judge



Hon. Franklin R. Theis
District Judge



Hon. Evelyn Z. Wilson
District Judge

CERTIFICATE OF MAILING

We hereby certify that a true and correct file-stamped copy of the above and foregoing

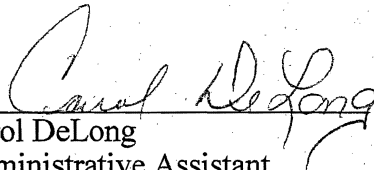
Memorandum Decision and Order was mailed on the 1st day of October

2014, by United States mail, postage prepaid thereon, to the following:

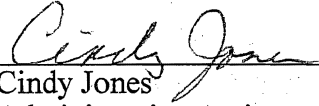
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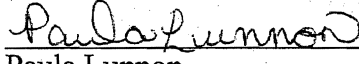
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