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**Testimony of the Office of the Attorney General
Written Proponent for SB 105
Committee on Federal and State Affairs
February 6, 2025**

Chairman Thompson and Members of the Committee:

The U.S. Constitution provides an avenue to replace U.S. Senators in the event of a vacancy. The 17th Amendment reads, “[w]hen vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”

The U.S. Code also addresses replacing vacancies. 2 U.S.C., Section 8 reads, “... the time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by death, resignation or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.”

The governor has the sole authority to fill temporary vacancies in the U.S. Senate in 37 states, and then the appointee serves until the next statewide general election. Nine states require that temporary appointments must be from the same political party as the vacating U.S. Senator. Similar to SB 105, Utah allows the legislature to submit a list of three recommendations from which the governor appoints.

The proposed procedure under Senate Bill 105 maintains the fundamental requirements of the 17th Amendment by preserving a special election to fill the vacancy and allowing the governor to make a temporary appointment. The key change is that the governor’s selection is now limited to a list of three individuals submitted by the legislature, all of whom must belong to the same political party as the departing senator. This approach has precedent in states like Hawaii and Wyoming, where governors have previously appointed U.S. Senators from lists provided by the political parties of the departing incumbents. Since these appointments were accepted without challenge in the U.S. Senate, a similar process involving the legislature rather than the political party is likely consistent with the Seventeenth Amendment.

No appointment has been made under Utah’s current replacement law, so Utah’s law has not been tested. However, the fact that other states have successfully used a narrowed selection process suggests that Senate Bill 105’s approach aligns with existing practices. Incorporating a legislative role in the nomination process does not appear to violate constitutional principles, because the legislature preserved the ability for the governor to make a choice when making a temporary appointment to the U.S. Senate.

While the precedent set by states like Wyoming and Hawaii suggests that limiting a governor's appointment to a narrowed list is permissible, lawmakers should be aware that such an approach is not without controversy. In Kentucky, a similar provision faced constitutional challenges when Democratic Governor Andy Beshear raised concerns about the legislature's authority to constrain his appointment power. Unlike Wyoming's Democratic Governor Dave Freudenthal, who appointed a Republican senator from a party-submitted list without objection, Governor Beshear questioned whether such a restriction violated the constitution by limiting his discretion in making a temporary appointment. The Kentucky legislature ultimately responded by repealing the statute and removing the governor's role in the appointment process altogether, instead requiring that all vacancies be filled solely by special election.

This precedent demonstrates that while appointment limitations have been implemented successfully in some states, they are not universally accepted and may be subject to legal or political challenges. If Senate Bill 105 is enacted, it is possible that similar objections could arise, particularly if a governor views the restriction as an unconstitutional infringement on his or her executive authority. Lawmakers should be prepared for potential legal scrutiny. Additionally, if litigation were to arise, it could delay the appointment process, potentially leaving the state without full representation in the U.S. Senate for an extended period.

Senate Bill 105's replacement process for the offices of insurance commissioner and state treasurer is likely permissible because both positions are statutory rather than constitutional offices. Since these offices were created by state law rather than being explicitly enshrined in the state constitution, the legislature has broad authority to establish and modify the process for filling vacancies. The legislature's ability to determine the method of appointment or replacement is a standard exercise of its legislative power, making the proposed changes legally sound.

Kansas has not sent a Democrat to the U.S. Senate since 1939. It is the longest current streak of one party controlling both of a state's U.S. Senate seats. Providing the legislature with the authority to recommend candidates to the Governor provides another layer of transparency and accountability to the process, and requiring that those potential appointees be from the same political party as the person vacating the seat preserves the will of the voters.

I urge your support of Senate Bill 105.

Respectfully Submitted,

A handwritten signature in black ink, reading "Kris W. Kobach". The signature is written in a cursive, flowing style with a large initial "K".

Kris W. Kobach
Attorney General of Kansas