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STATE OF KANSAS

**Testimony of
Kris W. Kobach
Kansas Secretary of State**

**Committee on Ethics and Elections
Kansas Senate**

Regarding HB 2104

March 11, 2015

Introduction

Mr. Chairman and Members of the Committee, it is an honor to come before you to advocate a bill that is designed to correct and prevent judicial misinterpretation of laws that the Kansas Legislature has enacted. Specifically, I urge your favorable recommendation of HB 2104, which is a direct response to two erroneous decisions rendered by Kansas courts prior to the November 2014 general election.

Two Episodes of Judicial Misinterpretation of the Law

In 1997, the Kansas Legislature attempted to address the problem of placeholder candidates filing for office and then withdrawing after the primary election, in order to allow party committees to place new candidates in the slots. The Legislature essentially revised the law so that there were only two ways to come off the ballot: the candidate dies, or the candidate becomes incapable of serving. To facilitate this second option, the Kansas Legislature amended K.S.A. 25-306b(b) by adding fourteen words to the statute: “who *declares* that they are incapable of fulfilling the duties of office if elected” (emphasis added). The gravity of a candidate formally declaring his or her incapacity was intended to prevent party leaders from inducing candidates to resign in the service of a larger political play, and to prevent parties from utilizing placeholder candidates.

However, in the 2014 decision of *Taylor v. Kobach*, the Kansas Supreme Court essentially nullified the act of the Kansas Legislature in 1997. The Court held that “declare” doesn’t really mean “declare.” The Court effectively erased the requirement that the Legislature specifically inserted in the law, by holding that no declaration of incapacity is necessary. According to the Court, simply stating “I withdraw pursuant to K.S.A. 25-306b(b)” is good enough. In so doing, the Court rewrote Kansas law. The Court also disregarded the clear intent of the Kansas Legislature.

That erroneous decision by the Kansas Supreme Court created a vacancy on the general election ballot, which in turn triggered K.S.A. 25-3905(a). That provision of Kansas law states the following:

“When a vacancy occurs after a primary election in a party candidacy, such vacancy *shall* be filled by the party committee of the ... state.”

K.S.A. 25-3905(a) (emphasis added). However, in *Orel v. Kansas Democratic Party*, a three-judge panel of the Shawnee County District Court ruled that, for the purposes of K.S.A. 25-3905(a), “shall” actually means “may.” Once again, a court rewrote Kansas law and disregarded the clear intent of the Kansas Legislature.

Unfortunately, it has become an increasingly common thing for courts to step beyond their proper judicial role and into the shoes of the legislature. They do so by rewriting the law in the guise of merely “interpreting” the law. This is troubling whenever it occurs. However, in election law, it is particularly important that courts stay within their constitutional role and not change the rules of the game after the election

contest has begun. Elections are the foundation of our constitutional republic; and it is crucial that the rules are clear, that all sides know the rules, and that the rules do not change.

What HB 2104 Does

Accordingly, my office has drafted HB 2104 in order to prevent the courts from changing the rules by misinterpreting the law. The bill does two things: (1) it removes the option of withdrawing by declaring incapacity; and (2) it makes clear to the judiciary that “shall” means “shall,” imposing a mandatory obligation to fill ballot vacancies.

As a practical matter, the incapacity option of K.S.A. 25-3905(a) was rarely used between 1998 and 2014. And when it was used, the Secretary of State’s office did not inquire into the truth of the declaration. However, it is likely that in most of those cases, the withdrawing candidate was not truly “incapable” of serving; rather serving in office had merely become “inconvenient.” HB 2104 removes the incapacity option, which prevents its abuse and ensures that the Kansas Supreme Court can never again defy the Kansas Legislature in this regard. Under HB 2104, the filing deadline of June 1 is the last point at which a candidate can change his or her mind. The candidate will be on the primary ballot; and if he wins the primary, he will be on the general election ballot unless he dies on or before September 1.

In the unlikely event that a candidate dies between June 1 and September 1 of an election year, HB 2104 makes clear that the relevant party committee *must* fill the vacancy. Section 5(d) requires the chairperson or vice-chairperson of the committee to execute a certificate, under oath, stating that a replacement candidate has been elected and that such person has agreed to accept the nomination. Section 5(e) states that “[f]or the purposes of this section, the word ‘shall’ imposes a mandatory duty and no court may construe that word in any other way.”

These two changes correct the errors of the Kansas courts and reassert the primacy of the Kansas Legislature in making election law. They also provide absolute clarity to candidates, parties, the public, and the courts regarding vacancies on the ballot.