IN THE SUPREME COURT OF KANSAS

STATE OF KANSAS *ex rel.* DEREK SCHMIDT, ATTORNEY GENERAL,	)	
Petitioner,	)	
v.	)	**Original Action No. _____**
GOVERNOR LAURA KELLY, in her official capacity;	)	
CHIEF JUSTICE LAWTON R. NUSS, in his official capacity;	)	
and	)	
KANSAS SENATE,	)	
Respondents.	)	

PETITION IN QUO WARRANTO

COMES NOW Petitioner, the State of Kansas *ex rel.* Derek Schmidt, Attorney General, and respectfully brings this action in quo warranto seeking an order declaring that no party—neither the Governor nor the Chief Justice—presently has the authority to appoint a nominee to fill the Kansas Court of Appeals vacancy created by the retirement of the Honorable Patrick D. McAnany.

This matter is of great urgency and significant public concern. Governor Laura Kelly has declared that she is entitled to appoint a new nominee but faces a deadline of May 17, 2019. In addition, the Legislature is expected to end its session soon, after which it will be unable to amend K.S.A. 2018 Supp. 20-3020 or act on

any nominee until it returns in January 2020, unless a special session were convened before then. Accordingly, the State is contemporaneously filing a motion to expedite this proceeding.

In support of the Petition, Petitioner alleges and states as follows:

I. JURISDICTION AND PARTIES

1. This is an original action in quo warranto pursuant to K.S.A. 60-1201, *et seq*. This Court has original jurisdiction by virtue of Article 3, § 3, of the Kansas Constitution, K.S.A. 60-1201, *et seq*., and Kansas Supreme Court Rule 9.01 (2018 Kan. S. Ct. R. at p. 58).

2. In accordance with Kansas Supreme Court Rule 9.01(a) (2018 Kan. S. Ct. R. at p. 58), Petitioner is filing a Memorandum in Support of this Petition, together with documentary evidence supporting the facts alleged.

3. For reasons further described in the Memorandum in Support that accompanies this Petition, the Court should exercise its original jurisdiction over this matter because the case presents legal issues of significant public concern; the relevant facts are established by the supporting documentary evidence; and there is a compelling need for an expeditious and authoritative ruling on the important legal issues presented. *See* Kansas Supreme Court Rule 9.01(b) (Kan. S. Ct. R. at p. 58-59).

4. Derek Schmidt is the duly elected, qualified, and acting Attorney General of Kansas. The Office of the Attorney General is created by Article 1, § 1, of the Kansas Constitution. Statutory provisions relating to the powers and

responsibilities of the Attorney General are found in K.S.A. 75-701, *et seq.*, and throughout the Kansas Statutes Annotated. The Attorney General has the authority to bring this action pursuant to K.S.A. 60-1203.

5. Respondent Laura Kelly is the Governor of the State of Kansas. The office of Governor is created by Article 1 of the Kansas Constitution.

6. Respondent Lawton R. Nuss is the Chief Justice of the Kansas Supreme Court. The Kansas Supreme Court, and the office of Chief Justice, are created by Article 3 of the Kansas Constitution.

7. Respondent Kansas Senate is one of the two branches of the Kansas Legislature created by Article 2 of the Kansas Constitution.

8. Governor Kelly may be served by a means specified in K.S.A. 2018 Supp. 60-205 as per Kansas Supreme Court Rule 1.11(a) (2018 Kan. S. Ct. R. at p. 11), and is being served as shown by the attached Certificate of Service hereto.

9. Chief Justice Nuss may be served by a means specified in K.S.A. 2018 Supp. 60-205 as per Kansas Supreme Court Rule 1.11(a) (2018 Kan. S. Ct. R. at p. 11), and is being served as shown by the attached Certificate of Service hereto.

10. The Kansas Senate may be served by serving its President Susan Wagle by a means specified in K.S.A. 2018 Supp. 60-205 as per Kansas Supreme Court Rule 1.11(a) (2018 Kan. S. Ct. R. at p. 11), and is being served as shown by the attached Certificate of Service hereto.

11. Petitioner has standing to assert this action pursuant to K.S.A. 60-1203, and the common law of the State of Kansas.

II. STATEMENT OF FACTS

12. Kansas Court of Appeals Judge Patrick D. McAnany retired from the Court of Appeals effective January 14, 2019. Judge McAnany's retirement date is subject to judicial notice per K.S.A. 60-409.

13. On March 15, 2019, the last day of the 60-day period for making an appointment under K.S.A. 2018 Supp. 20-3020(a)(4), Governor Kelly announced her appointment of District Court Judge Jeffry Jack to fill the vacancy created by Judge McAnany's retirement. *See* https://www.cjonline.com/news/20190315/gov-laura-kelly-nominates-southeast-kansas-trial-judge-for-court-of-appeals. This announcement is subject to judicial notice per K.S.A. 60-409.

14. On March 18, 2019, Judge Jack submitted a letter to Governor Kelly withdrawing his name from consideration as a candidate for the vacancy. The next day, Governor Kelly notified Senate Majority Leader Jim Denning by letter that Judge Jack had withdrawn his nomination at her request and that she intended to submit to the Senate a new nominee within 60 days. Copies of these two letters are attached as Exhibits A and B and incorporated herein per K.S.A. 60-210(c).

15. Senate President Susan Wagle responded with a statement arguing that the Governor's power to appoint a nominee expired on March 15, 2019, and that the authority to appoint a new Court of Appeals judge had therefore shifted to Chief Justice Nuss under K.S.A. 2018 Supp. 20-3020(a)(4). *See* https://www.cjonline.com/news/20190320/kansas-ag-derek-schmidt-seeks-calm-

clarity-on-court-of-appeals-nomination-authority. This statement is subject to judicial notice per K.S.A. 60-409.

16. Later on March 19, 2019, Attorney General Schmidt wrote a letter to Governor Kelly and President Wagle advising them against proceeding with a new appointee until the question of the proper appointing authority is definitively answered. A copy of the March 19, 2019, letter is attached as Exhibit C and incorporated herein per K.S.A. 60-210(c).

17. On March 22, 2019, Governor Kelly responded with a letter requesting Attorney General Schmidt's legal analysis and offering her understanding of why she is entitled to appoint a new nominee within 60 days from Judge Jack's withdrawal. A copy of the March 22, 2019, letter is attached as Exhibit D and incorporated herein per K.S.A. 60-210(c).

18. On March 26, 2019, Attorney General Schmidt responded to Governor Kelly's letter explaining that Governor Kelly's legal analysis "is one plausible conclusion" but "is not the *only* plausible conclusion." To ensure that all perspectives were considered, he proposed an argument for why the authority to appoint a new Court of Appeals judge had shifted to Chief Justice Nuss. Attorney General Schmidt also articulated a third possibility—that because K.S.A. 2018 Supp. 20-3020 does not address what is to happen in this situation, the statute as currently written provides no mechanism for either Governor Kelly or Chief Justice Nuss to fill the vacancy. In conclusion, Attorney General Schmidt renewed his call to obtain a definitive answer on the question, noting that he was aware of only two

ways for that to occur: legislation or litigation. Of these two, Attorney General Schmidt stated his preference that the Legislature amend the statute to address the current circumstances. A copy of the March 26, 2019, letter is attached as Exhibit E and incorporated herein per K.S.A. 60-210(c).

19. On April 12, 2019, Senate President Wagle responded that she does not believe a legislative fix is necessary or advisable and urged Attorney General Schmidt to bring a lawsuit to obtain a judicial resolution of the dispute. A copy of Senator Wagle's April 12, 2019, letter is attached as Exhibit F and incorporated herein per K.S.A. 60-210(c).

20. On April 19, 2019, Governor Kelly announced that the ad hoc group advising her on this nomination has forwarded to her the name of a new potential nominee for her consideration along with the two remaining names that the Governor did not select when she appointed Judge Jack. Governor Kelly reiterated her intention to submit a new appointment in time for the Senate to consider during its veto session, which is scheduled to convene May 1, 2019. Governor Kelly also asserted her view that the Senate "will then have 60 days to vote on the appointment" and that "[i]f the Senate does not vote, it is deemed to have consented." A copy of Governor Kelly's April 19, 2019, press release is attached hereto and incorporated herein per K.S.A. 60-210(c). *See* https://governor.kansas.gov/governor-announces-court-of-appeals-nominating-committee-candidates/.

21. Insofar as the current legislative session convened January 14, 2019,

and customarily adjourns sine die in May, it would be extraordinary and unlikely for the Senate to remain in session until the date on which Governor Kelly asserts her subsequent appointee will be deemed confirmed if there is not a Senate vote.

III. GROUNDS FOR RELIEF

22. K.S.A. 2018 Supp. 20-3020 provides the procedure for filling vacancies on the Kansas Court of Appeals.

23. K.S.A. 2018 Supp. 20-3020(a)(4) requires the Governor to make an appointment "within 60 days from the date such vacancy occurred or position became open"; otherwise, the appointment authority shifts to the Chief Justice of the Supreme Court.

24. Because Governor Kelly made the appointment of Judge Jack within 60 days of the vacancy, the authority and duty to make an appointment has not shifted to Chief Justice Nuss.

25. K.S.A. 2018 Supp. 20-3020(b) provides that if the "majority of the senate does not vote to consent to the appointment, the governor within 60 days *after the senate vote on the previous appointee*, shall appoint another person possessing the qualifications of office and such subsequent appointment shall be considered by the senate in the same procedure as provided in this section. The same appointment and consent procedure shall be followed until a valid appointment has been made." (Emphasis added.). This provision, by its plain terms, does not apply here.

26. Nothing in K.S.A. 2018 Supp. 20-3020 addresses what is to occur when

the Governor withdraws the appointee after the Governor's deadline to appoint but before the Senate can vote on that appointee. Because the statute is silent on this question, it provides no legal authority for either the Governor or the Chief Justice to fill a vacancy in this situation.

IV. RELIEF SOUGHT

WHEREFORE, for the reasons stated herein and in the Memorandum in Support of the Petition and Motion to Expedite, Petitioner seeks the following relief:

a. A determination of whether K.S.A. 2018 Supp. 20-3020 currently authorizes any official to make an appointment for the vacancy created by Judge McAnany's retirement, and, if so, whether Governor Laura Kelly or Chief Justice Lawton Nuss is the proper appointing authority.

b. An order granting Petitioner's motion to expedite this proceeding and providing for an expedited briefing schedule and oral argument setting;

c. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

By: /s/ Derek Schmidt
Derek Schmidt, #17781
Attorney General of Kansas
Jeffrey A. Chanay, #12056
Chief Deputy Attorney General

Toby Crouse, #20030
Solicitor General of Kansas
Dwight R. Carswell, #25111
Assistant Solicitor General
M. J. Willoughby, #14059
Assistant Attorney General
Kurtis Wiard, #26373
Assistant Attorney General

Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: jeff.chanay@ag.ks.gov
toby.crouse@ag.ks.gov
dwight.carswell@ag.ks.gov
mj.willoughby@ag.ks.gov
kurtis.wiard@ag.ks.gov

Attorneys for the State of Kansas ex rel. Derek Schmidt

CERTIFICATE OF SERVICE

The undersigned certifies that on April 22, 2019, a true and correct copy of the above and foregoing was served as per Kan. Sup. Ct. R. 1.11(a) and K.S.A. 60-205(b)(2)(B)(i) by delivering a copy to Respondents' Offices as follows:

Governor Laura Kelly
Office of the Governor
State Capitol
300 SW 10th Ave., Ste. 241S
Topeka, KS 66612-1590

Senate President Susan Wagle
Capitol Office, Room 333-E
300 S.W. 10th Ave.
Topeka, KS 66612

Chief Justice Lawton R. Nuss
Kansas Supreme Court
Kansas Judicial Center
120 S.W. 10th Ave.
Topeka, KS 66612

/s/ Dwight R. Carswell
Dwight R. Carswell

Exhibit A

March 18, 2019
Parsons, KS

Governor Laura Kelly
300 S.W. 10th St.
Topeka, KS 66612

Re: Court of Appeals

Dear Governor Kelly:

At your request, please convey to the Senate that I hereby withdraw from consideration for the Court of Appeals vacancy.

Respectfully yours,

Jeffry L. Jack

Exhibit B

STATE OF KANSAS

CAPITOL BUILDING, ROOM 241 SOUTH
TOPEKA, KS 66612

PHONE: (785) 296-3232
GOVERNOR.KANSAS.GOV

GOVERNOR LAURA KELLY

March 19, 2019

Senator Jim Denning
Majority Leader, Kansas Senate

Sen. Denning,

At my request, Judge Jeffry Jack has withdrawn from consideration for the Court of Appeals vacancy. I will forward a new nominee for the Senate's consideration within sixty days.

Sincerely,

Governor Laura Kelly

Exhibit C

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

March 19, 2019

Honorable Laura Kelly
Governor of Kansas
State Capitol
Topeka, Kansas 66612

Honorable Susan Wagle
President of the Senate
State Capitol
Topeka, Kansas 66612

Dear Governor Kelly and President Wagle:

I write with concern about the process for filling the current opening on the Kansas Court of Appeals created by the retirement of the Honorable Patrick McAnany. It is my understanding that the vacancy created by Judge McAnany's retirement occurred on January 14, 2019, and that sixty days after that date was March 15, 2019. I further understand that Governor Kelly publicly announced on March 15, 2019, her appointment of District Judge Jeffry Jack to fill Judge McAnany's position on the Court of Appeals and transmitted notice of that appointment to the Senate on the same day. I also am aware that the Governor has now requested Judge Jack withdraw from further consideration for this position and that the Governor confirmed today that he has done so.

The process for filling this vacancy on the Court of Appeals is provided by K.S.A. 20-3020. That statute provides, in pertinent part, that "[i]n event of the failure of the governor to make the appointment within 60 days *from the date such vacancy occurred or position became open*, the chief justice of the supreme court, with the consent of the senate, shall make the appointment of a person possessing the qualifications of office." *See* K.S.A. 20-3020(a)(4)(emphasis added). Any subsequent appointment will be made more than sixty days after the date the vacancy occurred.

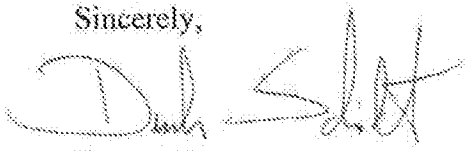
In a letter dated today and sent to Senate Majority Leader Jim Denning, the Governor confirmed the withdrawal from consideration of Judge Jack and stated: "I will forward a new nominee for the Senate's consideration within sixty days." *See* Letter of Governor Laura Kelly to Senator Jim Denning, March 19, 2019. By contrast, in a public statement issued today, the Senate President stated: "I believe it is now the obligation of the Chief Justice of the Kansas Supreme Court to nominate a new replacement." *See Senate President Wagle Issues Statement on Governor Kelly's Nomination to the Kansas Court of Appeals*, March 19, 2019.

In my view as Kansas Attorney General, it is essential that this critical legal question regarding the proper appointing authority be resolved *before* a subsequent appointment is made. The fundamental question is this: On the facts of this situation, has the governor been divested by operation of law of the authority to appoint a successor to Judge McAnany at this time and is that authority now vested by statute in the Chief Justice?

Until that question is definitively answered, I strongly advise against proceeding with a new appointee. Absent such a determination, a cloud will inevitably hang over the head of any new appointee, and any future litigant aggrieved by a future judicial decision of that appointee may have available the argument that the judge was unlawfully appointed and, thus, decisions he or she makes or participates in may be invalid. *See NLRB v. Noel Canning*, 573 U.S. 513 (2014)(recognizing the perils of an invalidly appointed member); *Nguyen v. United States*, 539 U.S. 69 (2003) (same, vacating criminal convictions).

Thank you for your consideration of this serious concern. I am certainly willing to work with the interested persons to obtain a definitive answer to that legal question.

Sincerely,



Derek Schmidt
Kansas Attorney General

CC: Honorable Jim Denning
Honorable Lawton Nuss

Exhibit D

STATE OF KANSAS

CAPITOL BUILDING, ROOM 241 SOUTH
TOPEKA, KS 66612

PHONE: (785) 296-3232
GOVERNOR.KANSAS.GOV

GOVERNOR LAURA KELLY

March 22, 2019

Hon. Derek Schmidt
Memorial Hall
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612

Dear Attorney General Schmidt,

Thank you for your letter of March 19, 2019, offering your thoughts and assistance after Senate President Wagle's public statement of the same day regarding my appointment to the Court of Appeals. As you are aware, Senate President Wagle stated "I believe it is now the obligation of the Chief Justice of the Supreme Court to nominate a new replacement" for the Court of Appeals vacancy created by Judge Patrick McAnany's retirement. As attorney general you have an opportunity to lend your office's expertise and your voice as an independent state officer—tasked with impartially and fairly enforcing the law—to help resolve the situation. I invite you to take that opportunity and to share your legal analysis with myself, Senate President Wagle, Senate Majority Leader Jim Denning, and Senate Minority Leader Anthony Hensley. And I urge you to move quickly, as the 60-day clock on a new appointment is ticking. I believe a discussion of the legal principles and authorities involved will help achieve an understanding of the correct way forward. In that spirit, I offer my understanding of the applicable law.

As your letter states, K.S.A. 20-3020 controls appointments to the Court of Appeals. Prior to 2013, appointments to the Court of Appeals were made using the same system as for the Supreme Court: the Supreme Court Nominating Commission advanced three nominees to the governor and the governor picked from those three. The 2013 change was intended to place such appointments more fully in the hands of elected political representatives and remove the Supreme Court Nominating Commission from the process. As a member of the legislature, I opposed that switch because the nominating commission process had worked well for decades, but there is no doubt its proponents intended to give the governor, as an elected representative of the people, a stronger role in selecting Court of Appeals judges.

Like the constitutional provision for selecting justices of the Kansas Supreme Court, K.S.A. 20-3020(a)(4) allows that "in the event of the failure of the governor to make an appointment within 60 days from the date" the Court of Appeals vacancy occurred, "the chief justice of the supreme court, with consent of the senate, shall make the appointment . . . ." Section 20-3020(b) addresses what happens when an appointment by the governor or chief justice fails: if "a majority of the senate does not vote to consent to the appointment, the

governor, within 60 days after the senate vote on the previous appointee, shall appoint another person" following the same procedure for Senate confirmation.

The issue Senate President Wagle has raised is whether, in the current circumstances where the initial 60-day period from the vacancy has expired and a timely appointment has been withdrawn, the chief justice now makes the appointment. Under any plausible interpretation of K.S.A. 20-3020, the answer must be no.

As you know, "[t]he fundamental rule of statutory interpretation is that the intent of the legislature is dispositive if it is possible to ascertain that intent," and courts look "to the plain and unambiguous language of a statute as the primary basis for determining legislative intent." *See Stanley v. Sullivan*, 300 Kan. 1015, 1017-18, 336 P.3d 370 (Kan. 2014). Section 20-3020 is explicit about when the chief justice makes the appointment: only "in the event of the failure of the governor to make an appointment within 60 days from the date" of the vacancy. K.S.A. 20-3020(a)(4). Plainly, the provision allowing the chief justice to make the appointment does not apply because the governor made "an appointment" within the 60-day period. There is no other provision transferring the appointment to the chief justice. Accordingly, because the governor made "an appointment" within 60 days of the vacancy, the appointment cannot now transfer to the chief justice.

If the statute does not explicitly transfer the appointment to the chief justice in these circumstances, who does make the appointment? The only answer that makes sense is the governor. Section 20-3020 allows for and contemplates the governor—and no one else—making a second appointment when the first fails.

Admittedly, K.S.A. 20-3020 does not *explicitly* address the event of a withdrawn nomination prior to the Senate voting to reject the nominee. Since it is reasonable to expect that sometimes a nomination will end before a vote in the Senate (for instance, the nominee could die before the vote, withdraw due to a family illness, withdraw due to significant Senate opposition or—as here—due to some controversy related to fitness for the position), it seems a significant oversight if the law does not account for such situations. But the legislature must have intended the governor to make a second appointment in these circumstances.

Perhaps most importantly, if the legislature intended K.S.A. 20-3020 to transfer the appointment to the chief justice when a timely gubernatorial appointment is withdrawn prior to a Senate vote, the legislature could have easily included such a provision in the statute. Instead, the legislature only provided for transfer of the appointment to the chief justice where the governor fails to make an appointment within 60 days of the vacancy. To transfer the appointment to the chief justice when the governor makes an appointment within 60 days but that appointment is withdrawn more than 60 days after the vacancy would require reading new language into the statute.

To determine legislative intent where the plain language of the statute does not explicitly address an issue, courts "may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested." *Herrell v. Nat. Beef Packing Company,*

LLC, 292 Kan. 730, 745, 259 P.3d 663 (Kan. 2011). Courts "should construe statutes to avoid unreasonable results." *Id.* The legislature cannot have intended to transfer the appointment to the chief justice when a gubernatorial appointment is withdrawn prior to a Senate vote because to do so would yield unreasonable results and be inconsistent with the purpose of K.S.A. 20-3020. And there are at least four reasons why.

First, to read in a provision transferring the appointment to the chief justice after a governor withdraws an obviously doomed appointment, or when the governor determines that the appointee should not have been chosen, would punish the governor for doing the right thing. The legislature cannot have intended to incentivize governors to fight to the end on a doomed appointment, especially when information comes to light that goes to the appointee's character and fitness for the position. It would be unreasonable and perverse to require governors in such circumstances to subject the government and the Senate to a destructive, wasteful process just to avoid forfeiting the appointment to the chief justice.

Second, K.S.A. 20-3020 clearly contemplates that when an appointment does not succeed, the governor gets the next appointment. The only provision for what happens after an appointment fails is subsection (b), which states that the governor gets 60 days to make a new appointment. (Interestingly, subsection (b) would also give the governor a new appointment if an appointment by the chief justice fails, as there is no provision for a chief justice to make a new appointment after an unsuccessful appointment.) There is no indication in the statute or anywhere else that the legislature intended anyone other than the governor to make a new appointment after an unsuccessful appointment.

Third, K.S.A. 20-3020 was enacted in 2013 at the urging of Governor Brownback and many legislators to make the process for appointing Court of Appeals judges more closely resemble the federal system where the executive, as an elected representative of the entire electorate, plays a stronger role in selecting judges. (Gov. Sam Brownback, *Governor signs judicial reform legislation into law*, governor.ks.gov (March 29, 2013), http://governor.ks.gov/frontpagenews/2013/03/27/gov-brownback-signs-judicial-reform-legislation-into-law, [https://cdm16884.contentdm.oclc.org/digital/collection/p16884coll3/id/76/rec/8] ("Known as the federal process, this procedure is similar to how justices for the United States Supreme Court are appointed."); Gov. Sam Brownback, *Governor highlights 2013 Legislative Session*, http://governor.ks.gov/frontpagenews/2013/06/02/governor-highlights-2013-legislative-session, [https://cdm16884.contentdm.oclc.org/digital/collection/p16884coll3/id/76/rec/8] (changing to "the federal process" will ensure selection of judges "through elected representatives").)

In the federal system, when a president's judicial nominee is withdrawn prior to a vote in the Senate, the president makes another appointment. Before the Senate voted, President George W. Bush withdrew his nomination of Harriet Myers to the Supreme Court and instead appointed Justice Samuel Alito. In 1873, President Grant appointed his attorney general, George Henry Williams, to be Chief Justice of the United States, but withdrew that nomination a month later after strong opposition emerged. Instead, Grant nominated a former attorney general, Caleb Cushing. Again, and this time only four days later, Grant withdrew Cushing's nomination amid

vigorous Senate opposition. Finally, Grant nominated Morrison R. Waite, who was confirmed as the Chief Justice a few weeks later. Presidents Washington and Tyler also withdrew Supreme Court nominations. Section 20-3020's purpose of emulating more closely the federal system of judicial appointments is not accomplished by transferring the appointment power to the chief justice in situations not explicitly set out in the statute.

Fourth, the provision in subsection (a)(4) transferring the appointment to the chief justice when the governor fails to make an appointment within 60 days was not intended to divest a governor of the appointment when the governor has acted to assert her authority to make the appointment. The language is based on a similar, longstanding provision in the Kansas Constitution, Art. 3, § 5(b), that allows the chief justice to make the appointment of a supreme court justice when the governor does not act within 60 days to appoint one of the three nominees submitted from the Supreme Court Nominating Commission. As you know, that provision as it exists in the context of K.S.A. 20-3020 is intended to prevent a governor from delaying the appointment and leaving the court shorthanded, it is not a "gotcha" provision designed to divest the governor of the appointment when she has acted to make an appointment. (*See* Attorney General Derek Schmidt, *Testimony in Support of House Concurrent Resolution 5002*, January 22, 2013, http://www.kslegislature.org/li_2014/b2013_14/committees/ctte_h_jud_1/documents /misc/ (a provision proposed for selecting Supreme Court justices and identical to K.S.A. 20-3020(a)(4) sought "to ensure that vacancies on the appellate courts not endure interminably, particularly in election years, by providing that if the governor fails to timely appoint a new judge for Senate consideration then the Chief Justice must do so," and under that provision "neither the governor nor the Senate may use inaction as a means of delaying the filling of a vacant position"). Identical language in K.S.A. 20-3020(a)(4) exists for the same reasons: to allow the governor to defer when she decides for whatever reason not to make an appointment and to prevent an extended vacancy from hampering the court's business. It is not a "gotcha" provision designed to divest the governor of her appointment when a previous gubernatorial appointment is unsuccessful.

And a "gotcha" provision is exactly what subsection (a)(4) will be if it is interpreted to apply to this situation. It will be a mechanism for political mischief. It would not only incentivize a governor to double-down on a doomed appointment, but when the governor makes an appointment the Senate majority intends to oppose it would also incentivize the majority party in the Senate to delay consideration and public discussion of an appointment in order to run out the 60-day clock and force either a withdrawal or a destructive, unnecessary confirmation battle.

These perverse results cannot be what the legislature and Governor Brownback intended when they enacted K.S.A. 20-3020. The only outcome that makes sense under the law and under established legal standards for interpreting the law is for the governor—not the chief justice—to make an appointment within 60 days. Section 20-3020 is not a model of clarity, and it has its deficiencies. As I have said as a state senator and now as governor, I support reverting back to the official nominating commission model for selecting Court of Appeals judges, a system that served Kansas well for decades and that continues to work well for the selection of Kansas Supreme Court justices.

Again, thank you for your offer to assist in the resolution of this matter. I know you share my desire to follow the law without regard for the politics of the moment, and I look forward to a prompt response with your views on the correct way forward under the law.

Sincerely,

Laura Kelly
Governor

CC: Senate President Wagle
Senate Majority Leader Denning
Senate Minority Leader Hensley

Exhibit E

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

March 26, 2019

Honorable Laura Kelly
Governor of Kansas
State Capitol, 2nd Floor
Topeka, Kansas 66612

Re: Appointment of Judge to Court of Appeals

Dear Governor Kelly:

Late Friday afternoon, I received your letter dated March 22, 2019, responding to my letter of March 19 and requesting our legal analysis of whether, on the facts of the current situation, Kansas law provides for you or for the Chief Justice to make the next appointment to fill the current vacancy on the Kansas Court of Appeals.

This is a matter of first impression in Kansas. The current statute authorizing the gubernatorial appointment and Senate confirmation process for Court of Appeals judges was enacted in 2013, and to my knowledge this is the first time its use has resulted in the discovery of new information that caused a Governor to seek withdrawal of the appointment rather than proceed to a Senate vote. Of course, prior to 2013 this situation would not have arisen because without the requirement for Senate confirmation the Governor's appointment would have been complete before the adverse information was discovered; thus, all involved in the appointing process would have acted without the benefit of that information.[1]

As I see the current situation, the issue to be resolved is not whether you had the authority to withdraw the appointment. It appears that you did.[2] Rather, the issue is what effect, if any, that

[1] *See Burke v. Schmidt*, 191 N.W.2d 281, 284-286 (S.D. 1971) (explaining that once an appointment is complete it may not be withdrawn).

[2] Although K.S.A. 20-3020 is silent as to whether the Governor or Chief Justice may withdraw her or his appointment of a Court of Appeals judge before a Senate vote on confirmation, K.S.A. 75-4315b(c) appears to allow for such withdrawal.

withdrawal has on the 60-day time limit in K.S.A. 20-3020(a)(4), and thus whether you are now time-barred from making the next appointment. If you are so barred, then that authority and duty has shifted to the Chief Justice.[3] The legal problem here arises because of the *timing* of the appointment and withdrawal, which were matters of gubernatorial discretion and control.[4]

As Attorney General, I have no particular preference whether the Governor or Chief Justice now makes this appointment, subject to Senate confirmation.[5] I simply want the law to be followed correctly, and of course I do have a strong interest, on behalf of the legal interests of the State and our citizens, in ensuring the correct appointing authority is chosen so the legitimacy of the next judge will be beyond dispute. As I noted in my March 19 letter, unless the appointment is made by one with unquestioned authority to do so, such nomination is arguably void and presents a risk of serious disruption to any future litigation before the appointed judge. This is not a hypothetical concern; a similar situation currently is unfolding in Iowa, where a dispute about whether Governor Reynolds missed a deadline to appoint a judge has led to litigation as to whether she or the Chief Justice was the proper appointing authority.[6]

The legal analysis set forth in your letter as to why you think current law authorizes you, as Governor, to make a follow-on appointment within a new 60-day time limit is one plausible conclusion. Indeed, in the event you and the Senate disregard my advice to obtain a "definitive[] answer[]" as to who now possesses that authority and duty, and if you proceed to make an appointment that is confirmed by the Senate and at any point thereafter the validity of your

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[3] As I understand the facts, you notified the Senate on the 60th day of your decision to appoint Judge Jack but on the 64th day further notified the Senate that you were withdrawing the nomination. Your notice of withdrawal occurred before any Senate vote – indeed, before any formal Senate action whatsoever related to the nomination.

[4] This discretionary timing issue also presents a concern about the reasoning in your letter. A Governor who wished to delay or avoid filling a Court of Appeals vacancy could in effect render the 60-day statutory limitation a nullity by repeatedly making then withdrawing appointments, each time receiving a fresh 60 days. As you note in your letter, that would be contrary to the apparent legislative intent of the statute's 60-day provision transferring appointing authority to the Chief Justice, which you aptly describe as being aimed at "prevent[ing] a governor from delaying the appointment and leaving the court shorthanded." *See* Kelly letter, p. 4.

[5] The State probably faces a binary choice. By law, upon the withdrawal of Judge Jack's nomination after the expiration of the 60-day statutory time frame for making the appointment, either the Governor or the Chief Justice now has the exclusive statutory authority to make the next appointment, with the consent of the Senate, to fill the Court of Appeals vacancy. There is a possibility, however, of a third option: The statute fails to invest *any* person with appointing authority on the facts of this situation. If the "failure of the governor to make the appointment" clause in K.S.A. 20-3020(a)(4) does not apply, then the statute is silent on the situation we have here, as your letter acknowledges. Kelly letter, p. 2. In that case, the situation would seem to fall under the "omitted-case canon": "The principle that a matter not covered is not covered is so obvious that is seems absurd to recite it. The judge should not presume that every statute answers every question, the answer to be discovered through interpretation. . . . What the legislature 'would have wanted' it did not provide, and that is an end of the matter. As Justice Louis Brandeis put the point: 'A casus omissus does not justify judicial legislation." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 93-93 (2012). Granted, not having any way to fill the vacancy would be problematic, but it is a problem the Legislature can solve.

[6] *See Gov. Reynolds didn't meet deadline to appoint judge, Des Moines lawyer argues, The Gazette*, February 1, 2019 (available at https://www.thegazette.com/subject/news/government/iowa-governor-kim-reynolds-didnt-meet-deadline-to-appoint-judge-jason-besler-des-moines-lawyer-argues-20190218).

appointment is challenged in court in a manner that requires my office to defend its validity, we no doubt will make many of the same arguments articulated in your letter.

However, yours is not the *only* plausible conclusion. In the spirit of helping ensure that all legal analyses are considered, I will set forth a countervailing interpretation of current law. These are the sorts of arguments we would make in the event the Chief Justice were to make the next appointment without first obtaining the recommended "definitive[] answer[]," the Senate confirms his appointment, and the validity of his appointment later is challenged in court in a manner that requires my office to defend its validity.

A Case for the Chief Justice's Appointment Authority and Duty

K.S.A. 20-3020 establishes time limits, binding both the Governor and the Senate, within which certain actions related to the appointment and confirmation of a new judge for the Court of Appeals must occur or else statutory consequences are triggered by operation of law. For example, the Governor must "make the appointment within 60 days from the date such vacancy occurred" or else "the chief justice of the supreme court ... shall make the appointment" and the Governor loses jurisdiction to appoint unless and until "a majority of the senate does not vote to consent to the appointment."[7] Similarly, once an appointment is submitted to the Senate, the Senate "shall vote to consent to any such appointment not later than 60 days after such appointment is received by the senate"[8] or else "the senate shall be deemed to have given consent to such appointment" and the Senate loses jurisdiction to vote whether to confirm.[9] From their plain language, these statutory time limits appear to operate in a manner analogous to other statutorily created time limits that are jurisdictional in nature, such as the statutory time limit to file a notice of appeal. *See Board of County Comm'rs of Sedgwick County v. City of Park City*, 293 Kan. 107, 111 (2011) (appellate court lacks jurisdiction over an appeal taken out of time). There is no indication the Legislature created, or intended to create, a "close enough" exception to these time limits, and thus the plain language of the statute would be fatal to an attempt by either the Governor or the Senate to exercise authority out of time: A Senate vote cast on the 61st day after the Senate received the appointment would be of no force and effect because the appointment would have been deemed confirmed the prior day; similarly, a gubernatorial appointment on the 61st day after the vacancy occurs would be of no force and effect because the authority to appoint would have shifted to the Chief Justice the prior day.[10]

The pertinent statutory interpretation question, therefore, would seem to be focused on this key language in K.S.A. 20-3020(a)(4): "In the event of the failure of the governor to make the appointment within 60 days ...." Within the meaning of this phrase, was your statutory duty

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[7] *See* K.S.A. 20-3020(a)(4), (b).

[8] Or, if the senate is not and will not be in session within the 60-day time limitation, within 20 days after the senate begins its next session. K.S.A. 20-3020(b).

[9] K.S.A. 20-3020(b).

[10] *See Hand v. Winter*, 388 P.3d 651, 652 (N.M. 2016) (in similar judicial appointment system, "appointment becomes the responsibility of the Chief Justice" after time limit has elapsed); *see also State ex rel. Richardson v. 5th Judicial Nominating Commission*, 160 P.3d 566, 572 (N.M. 2007) (describing time limit for authority to pass to Chief Justice from Governor as "strict").

irrevocably satisfied on the 60th day when you notified the Senate of your selection of Judge Jack or did you "fail[] … to make the appointment" on or after the 60th day when you further notified the Senate of your desire to withdraw the appointment and prevent completion of the statutory process for filling the vacancy, including a Senate vote? If it is the former, then neither the authority nor the duty to appoint has shifted to the Chief Justice; but if it is the latter, then you did not satisfy the requirement of the statute and both the authority and the duty to appoint have shifted to the Chief Justice.

To ascertain which of these meanings of the statute is correct, a reviewing court would turn to the well-known framework for statutory interpretation:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. We determine legislative intent by first applying the meaning of the statute's text to the specific situation in controversy … giving ordinary words their ordinary meanings. A court does not read into the statute words not readily found there. When the language is unclear or ambiguous, the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning.[11]

Thus the threshold question is whether the statutory phrase "failure of the governor to make the appointment within 60 days" is plain and unambiguous when giving common words their ordinary meanings. The Legislature did not define "failure" to make the appointment. The Merriam-Webster dictionary defines failure as, *inter alia*, "lack of success."[12] The American Heritage Dictionary of the English Language defines failure as "[t]he condition of fact of not achieving the desired end or ends" or, alternatively, "[t]he condition or fact of being insufficient or falling short."[13] Black's Law Dictionary has defined failure as "[a]bandonment," "[d]eficiency," or "an unsuccessful attempt."[14] Those definitions would seem to describe what happened here: The appointment of Judge Jack lacked success, did not achieve the desired end of advancing an appointee to the next stage of the selection process, was insufficient and fell short of accomplishing the purpose of the appointment, and was ultimately abandoned, deficient, and constituted an unsuccessful attempt to present an appointee for Senate confirmation. If a reviewing court thought this language clear and unambiguous, then it would determine there has been a "failure of the governor to make the appointment within 60 days" and the appointing authority has shifted by operation of law to the Chief Justice.

If, however, a reviewing court concludes that this statutory language is ambiguous, then it would attempt to ascertain the Legislature's intent in other ways. One of those ways, as your letter points out, is through a review of legislative history or other background considerations, although it is not necessarily obvious that the conclusions your letter draws from legislative

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[11] *Miller v. v. Bd. of Cty. Comm'rs, Wabaunsee Cty.*, 305 Kan. 1056, 1059 (2017) (internal citations omitted).

[12] https://www.merriam-webster.com/dictionary/failure?src=search-dict-box.

[13] https://www.ahdictionary.com/word/search.html?q=failure

[14] Black's Law Dictionary, 5th Edition, p.534. The newer 10th edition, however, does not include abandonment or unsuccessful attempt in the definition.

history are, in fact, the conclusions the legislative history supports – or at least not the *only* supported conclusions.[15]

But that is not the only way. Kansas courts also may use canons of statutory construction to discern the Legislature's intent. When the Legislature demonstrates through use of statutory language that it knows how to do a particular thing, the absence of such language in a different statute "strongly suggests that there it did not so intend."[16] Pertinent to the current situation, the Legislature has expressly provided a mechanism for the withdrawal and substitution of judicial nominations sent to the Governor by the Kansas Supreme Court Nominating Commission and local district judicial nominating commissions.[17] Notably, in those contexts, like in the current situation, the Governor also has a 60-day statutory time limit to act or else the authority and duty to make the appointment shifts from the Governor to the Chief Justice, but in both of those settings, unlike in the Court of Appeals appointment statute, the Legislature *expressly provided a statutory mechanism for the extension of that 60-day time limit in the event of a withdrawal or substitution of one or more nominees*.[18] The absence of any similar language in K.S.A. 20-3020 "strongly suggests that there [the legislature] did not so intend."[19] Nor was the 2013 legislation that created the mechanism now in K.S.A. 20-3020 merely silent on the subject; rather, it actually *repealed* the prior statutory mechanism that had existed for extending the 60-day time limit in the event of a withdrawal or substitution of a Court of Appeals nominee.[20] And while it might be convenient to find a similar mechanism implied in this situation, Kansas courts "cannot delete vital provisions or supply vital omissions in a statute. No matter what the Legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one that the Legislature alone can correct."[21]

Other provisions in K.S.A. 20-3020 are consistent with that conclusion. Only two clauses in the statute seem to address the Governor making a subsequent appointment after a failed appointment. The first clause provides that "[i]n the event a majority of the senate does not vote to consent to the appointment, the governor, within 60 days *after the senate vote on the previous appointee*, shall appoint another person possessing the qualifications of office and such subsequent appointment shall be considered by the senate in the same procedure as provided in

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[15] For example, while it is true that the legislative history shows at least some proponents of the legislation that enacted what is now K.S.A. 20-3020 sought to create something akin to the "federal model" for judicial selection, it is apparent that is not in fact what the bill did. For example, there are no time limits for a presidential appointment in the federal model, there are no time limits for Senate action in the federal model, there is no contingency for a different appointing authority in the federal model, there is no requirement that the identities of unsuccessful applications be published in the federal model, and there is no provision for deeming the Senate's consent absent an actual vote in the federal model. Obviously, what was in fact created in Kansas differs from the federal model, and thus analogies and comparisons to the federal system for appointment and confirmation of judges are arguably of limited value in determining the intent of the Kansas Legislature in this situation.

[16] *State v. Nambo*, 295 Kan. 1, 4-5 (2012) (citing, *inter alia*, *Zimmerman v. Bd. of County Comm'rs of Wabaunsee County*, 289 Kan. 926, 974 (2009)).

[17] K.S.A. 20-2910, K.S.A. 20-134.

[18] K.S.A. 20-2911(a); K.S.A. 20-135.

[19] *Nambo*, 295 Kan. at 5.

[20] L. 2013, ch. 1, § 5 (repealing K.S.A. 2012 Supp. 20-3008 and 20-3009).

[21] *State v. Urban*, 291 Kan. 214, 216 (2010).

this section."[22] By its plain terms, the condition precedent under this clause for resetting the 60-day time limit – a Senate vote on the previous appointee – has not occurred. Thus, with that clause unavailable, the only 60-day time limit in the statute that can apply is the 60-day time limit contained in K.S.A. 20-3020(a)(4) that began on January 14, 2019. The second clause is the statute's next sentence, which tends to buttress the same conclusion: "The *same* appointment and consent procedure shall be followed until a valid appointment has been made."[23] The obvious question is: Same as what? On the facts of this situation, it must mean the same as the original procedure — a 60-day time limit for a gubernatorial appointment that began January 14, 2019, and expired March 15, 2019 — because the clause for allowing a *new* 60 days after a Senate vote never was triggered.

Conclusion and Recommendation

For the reasons set forth above, it seems to us possible that a reviewing court could reasonably reach either conclusion as to whether, on the facts of this situation, the Governor or the Chief Justice is now the proper appointing authority.

Unfortunately, because the stakes here are high and the potential consequences of "guessing" incorrectly quite distressing, it seems to me unwise to save the determination for a later time after the appointment has been made. Even if you and the Senate were to reach political compromise on who the proper appointing authority now is under current law, that almost certainly will not resolve the problem because it would not be a binding legal determination that would preclude subsequent litigation on this issue.

As I indicated in my letter of March 19, for that reason I have serious concerns about the situation in which the State now finds itself. Without a definitive answer – a *binding legal determination* or legislation resolving this apparent ambiguity – as to who the proper appointing authority now is, future litigants who appear before whatever person ultimately becomes the next Court of Appeals judge could have available to them an attack on a Court of Appeals action by arguing that a judge sitting on their case is not properly appointed and, therefore, is not properly exercising the judicial power of the State of Kansas. While our office would, of course, strongly fight any such argument in any case in which we are representing the State's interests, it seems to me unwise and perhaps even reckless to invite that foreseeable future litigation. It is far better to definitively determine that answer now, in a context focused on the Court of Appeals appointments statute, rather than later in the context of, for example, the validity of a Court of Appeals decision affirming or reversing a murder or other major felony conviction.

That is why I continue to strongly recommend reaching a definitive answer as to who is the proper appointing authority before proceeding to make the appointment. At this time, I am aware of only two mechanisms to obtain such a definitive answer.

LEGISLATION: The first mechanism is for you and the Legislature to work together to amend K.S.A. 20-3020 in a manner that eliminates any possible ambiguity. As I have expressed

[22] K.S.A. 20-3020(b) (emphasis added).
[23] K.S.A. 20-3020(b) (emphasis added).

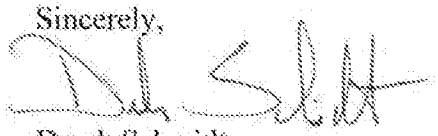
separately to you and to the Senate President, this seems to me the more straightforward and desirable option and is what I recommend. If you can simply agree on what should happen next, then work together while the Legislature remains in session to make it so. Various options exist for a statutory fix; some are quite simple. Accomplishing this before the first adjournment of the Legislature less than two weeks from now will require cooperation and leadership, but it certainly can be done.

LITIGATION: The second mechanism is to seek a legally binding judicial determination of who the proper appointing authority now is. That could be accomplished through the filing of a proper lawsuit "to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of public business."[24] While this option may obtain the sort of definitive answer I recommend – and thus forestall the risk of after-the-fact litigation about the next Court of Appeals judge's legitimacy – it also is fraught with uncertainty and may be considerably more difficult than a legislative fix to accomplish in a timely manner. It also may be costly if conflicts of interest make necessary the retention of outside counsel.

I have copied this letter to the individuals you requested. I also have copied the Chief Justice because, in his administrative capacity, he obviously is an interested party in this matter. Further, I have copied Speaker Ryckman because any legislative fix to the statute necessarily would involve him.

I hope the above information is helpful. Please let me know if I may be of further assistance.

Sincerely,



Derek Schmidt
Kansas Attorney General

Cc: Senate President Susan Wagle
Senate Majority Leader Jim Denning
Senate Minority Leader Anthony Hensley
Speaker Ron Ryckman
Chief Justice Lawton Nuss

[24] *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 877 (2008).

Exhibit F

State of Kansas

Susan Wagle

Senate President

April 12, 2019

Honorable Derek Schmidt
Attorney General of Kansas
Memorial Hall
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612

Re: Additional considerations for Court of Appeals vacancy appointment issue; request for additional legal analysis regarding May 14, 2019 deadline

Dear Attorney General Schmidt:

I have reviewed your March 19, 2019 letter advising Governor Kelly and me against proceeding with a new nominee for the Court of Appeals vacancy until the "critical legal question regarding the proper appointing authority [is] resolved."[1] I have also reviewed Governor Kelly's March 22, 2019 response and your subsequent March 26, 2019 letter.

In your second letter, you capably articulate the legal arguments supporting my position that the Chief Justice now has the statutory duty to appoint the judicial vacancy at issue. You also indicate that both my position and Governor Kelly's position are "plausible conclusions" when reading the K.S.A. 20-3020. I believe the plain language of K.S.A. 20-3020 is unambiguous, but I also believe Governor Kelly has attempted to reach a good faith, albeit incorrect, legal reading of the statute. You also state that you "are aware of only two mechanisms to obtain . . . a definitive answer" regarding the proper appointing authority for this vacancy: legislation and litigation. While I respect your preference for passing legislation in the next few weeks that "eliminates any possible ambiguity" in the statute, I have serious concerns with this approach.

First, I do not believe a legislative "fix" is necessary. While there may be sound policy arguments for comprehensive reform to the state's judicial selection process, such policy discussions should occur in the ordinary course of legislative deliberation. However, passing legislation merely because Governor Kelly does not like the statutory consequence of her actions would not be a "fix" so much as an accommodation of her failure to properly vet her own judicial candidate.

[1]Letter from Derek Schmidt, Kansas Attorney General, to Laura Kelly, Kansas Governor, and Susan Wagle, President of the Kansas Senate (March 19, 2019).

SENATOR 30TH DISTRICT
SEDGWICK COUNTY
4 N. SAGEBRUSH ST.
WICHITA, KANSAS 67230

ROOM 333-E
STATE CAPITOL
TOPEKA, KANSAS 66612
785 296-2419

Second, hastily passing legislation affecting all three branches of government on an accelerated, beat-the-clock timeframe invites the creation of bad policy. As discussed below, I believe a deadline of May 14, 2019 (60 days from some form of a triggering event that occurred on March 15, 2019) exists under certain alternative interpretations of K.S.A. 20-3020. Two of these scenarios have been discussed at length in the previous correspondence: 1) either the *Governor* must make a new appointment by May 14, 2019; or 2) the *Chief Justice* must make an appointment at some point in time. There is a third scenario that you intimated but did not discuss in your second letter: that the *Senate* must act on Judge Jack's appointment by May 14, 2019 if under K.S.A. 20-3020 an appointing official *cannot* withdraw an appointment once made.[2] My purpose for this letter is to raise this and other supplemental considerations that must inform the path to a "definitive answer" regarding the proper appointing authority for this vacancy.

Governor Kelly has lost right to reappoint

My position has been plain since my initial public comments on the issue: because Governor Kelly withdrew Judge Jack's appointment or otherwise failed to make an appointment by March 15, 2019, current law now requires the Chief Justice to make this appointment. This is now the 88th day after the vacancy caused by Judge Patrick McAnany's retirement occurred. The Governor failed to make an appointment to fill that vacancy within 60 days after attempting to appoint and subsequently withdrawing Judge Jack from Senate consideration. To date, no gubernatorial appointment for this vacancy has been read in or officially received by the Senate.

Governor Kelly's failure to properly vet her own judicial nominee has triggered the 60-day time limit on her statutory right to appoint this vacancy under K.S.A. 20-3020. As you cited in your letter, K.S.A. 20-3020(a)(4) provides that "[i]n the event of the failure of the Governor to make an appointment within 60 days from the date such vacancy occurred or position became open, the chief justice of the supreme court, with the consent of the senate, shall make the appointment of a person possessing the qualifications of office."

Governor Kelly now believes she is permitted a "do over" on this appointment, despite the fact that K.S.A. 20-3020 provides for no new 60-day time period after a Governor withdraws her appointment. Unlike non-judicial gubernatorial appointments subject to senate confirmation, gubernatorial appointments of Supreme Court justices, Court of Appeals judges, and district court judges are all subject to a 60-day time limit.[3] For all such judicial appointments, if the Governor has failed to make an appointment after 60 days, the Chief Justice shall make the appointment. As you note in your letter, K.S.A. 20-3020 contains no language regarding circumstances that would toll or restart the 60-day time limit if the Governor fails to appoint.

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[2] *"Although K.S.A. 20-3020 is silent as to whether the Governor or Chief Justice may withdraw her or his appointment* of a Court of Appeals judge before a Senate vote on confirmation, K.S.A. 75-4315b(c) appears to allow for such withdrawal." Letter from Derek Schmidt, Kansas Attorney General, to Laura Kelly, Kansas Governor, n.2 (March 26, 2019) (emphasis added).

[3] *See* Kan. Const. art. III, § 5 (Supreme Court appointments); K.S.A. 20-3020 (Court of Appeals appointments); K.S.A. 20-2911 (district court appointments).

Alternative scenario: Senate must act on Judge Jack's appointment by May 14, 2019

Again, you have already adequately described the legal arguments supporting my position while acknowledging the plausibility of Governor Kelly's contrary legal arguments. I will not rehash those arguments here. However, I do believe we must consider another scenario not significantly addressed by you or Governor Kelly, namely, that K.S.A. 20-3020 *precludes* the ability of a Governor to withdraw an appointment. In your March 26 letter, you reference K.S.A. 75-4315b as "appear[ing to] allow for such withdrawal" but that K.S.A. 20-3020 is nevertheless "silent as to whether the Governor may withdraw her or his appointment of a Court of Appeals judge before a Senate vote on confirmation."[4]

I raise this not because I believe it to be an accurate interpretation of the statutory provisions, but because it is yet another *plausible* interpretation of the controlling statute. Under this interpretation, if a Governor makes an appointment within the 60-day statutory time frame, the Senate has a duty to vote on the appointment within 60 days, regardless of a Governor's attempt to subsequently withdraw the appointment. If the Senate fails to vote within 60 days of the appointment, it "shall be deemed to have given consent to such appointment."[5]

Applied here, if Governor Kelly's appointment of Judge Jack was received by the Senate on March 15, 2019 (an unsettled factual issue in its own right) and statutorily cannot have been later *withdrawn* by her under K.S.A. 20-3020, the Senate must vote on the appointment on or before May 14, 2019. Ratification of Judge Jack's pending appointment due to inadvertent Senate inaction would obviously be unacceptable, given the widespread public concern regarding Judge Jack's fitness to serve that has been subsequently acknowledged by Governor Kelly. I have requested below that you provide further analysis on this issue, and I have copied the leadership of the Senate Judiciary Committee to apprise them of the Senate's potential duty to act by May 14, 2019.

Governor Kelly is the beneficiary of an improved system

The issue of the appropriate appointing authority for this vacancy after March 15, 2019 has not been caused by the law but rather by Governor Kelly's failure to comply with the law. However, in her letter, Governor Kelly nevertheless criticizes the language of K.S.A. 20-3020 in an attempt to pass blame from her own actions onto a law with which she states she opposed on policy grounds as a senator in 2013. In her letter, she states that K.S.A. 20-3020 "is not a model of clarity," "it has deficiencies," and she "support[s] reverting back to the official nominating commission model for selecting Court of Appeals judges."[6] These statements are astonishing for at least two reasons.

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[4]Letter from Derek Schmidt, Kansas Attorney General, to Laura Kelly, Kansas Governor, n.2 (March 26, 2019).
[5]K.S.A. 20-3020(b).
[6]Letter from Laura Kelly, Kansas Governor, to Derek Schmidt, Kansas Attorney General, p. 4 (March 22, 2019).

First, the adoption of the federal model in 2013 for Court of Appeals appointments is the *only* reason the integrity of this judicial appointment was preserved after the revelations of Judge Jack conduct. In December 2018, then-Governor-elect Kelly began the process of vetting candidates for this vacancy with great pomp and public ceremony by attempting to recreate her own version of the nominating commission model.[7] This was and continues to be her prerogative as Kansas' duly-elected Governor. A Governor under the federal model should have unlimited discretion how to vet and screen potential candidates for judicial appointment.

Yet it was not her ad hoc "nominating commission" of lawyers and political operatives that uncovered Judge Jack's unfitness issues—it was the democratic check of senate confirmation.[8] Were it not for senate confirmation being added to the Court of Appeals selection process in 2013, Judge Jack's appointment to the bench would have been complete on March 15, 2019, just a few days before the public became aware of his troubling history of partisan and vulgar social media comments made while a sitting judge.

Were it not for the senate confirmation process, Judge Jack would be sitting on the Court of Appeals today. This is something even Governor Kelly has acknowledged would be unacceptable when withdrawing his nomination on March 19, 2019.[9] An even more troubling thought is that had this been a *state Supreme Court* appointment, Judge Jack would be on that court today.[10]

Governor Kelly (along with the people of Kansas) has been the beneficiary of an improved judicial selection system requiring senate confirmation of Court of Appeals judges. It is baffling that Governor Kelly would criticize the very system that spared her the extended embarrassment and destabilizing effect of Judge Jack ascending to the bench amid such universal objections to his fitness to serve, including her own.

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[7]Peter Hancock, *Brownback changed the way Court of Appeals judges are selected; Gov.-elect Kelly will use merit-based system*, LAWRENCE JOURNAL-WORLD, November 29, 2018, *available at* http://www2.ljworld.com/news/state-government/2018/nov/29/brownback-changed-the-way-court-of-appeals-judges-are-selected-gov-elect-kelly-will-use-merit-based-system-instead. Interestingly, Governor Kelly didn't use the supreme court nominating commission or ask the state bar to select the members of her advisory nominating committee but rather formed her own hand-picked group of lawyers and political operatives. Apparently, Governor Kelly has recognized the increased legitimacy of "nominating commission" members being selected by *democratically elected officials* such as herself instead of unelected lawyers.

[8]"Gov. Laura Kelly's staff and a hand-picked committee failed to find a string of profane and partisan tweets by Judge Jeffry Jack before she nominated him to the Kansas Court of Appeals." Jonathan Shorman & Lara Korte, *Gov. Kelly's team didn't perform standard hiring task: Check judge's social media*, WICHITA EAGLE, March 19, 2019, *available at* https://www.kansas.com/news/politics-government/article228135879.html.

[9]"'I'm surprised and disappointed that a sitting judge would engage in this type of rhetoric,' Kelly said. 'It's unacceptable for a sitting judge, who must be seen as unbiased and impartial, to post personal political views on social media.'" Press Release, Office of the Governor, Governor withdraws her nomination of Judge Jeffry Jack, requests more names (Mar. 19, 2019), *available at* https://governor.kansas.gov/governor-withdraws-her-nomination-of-judge-jeffry-jack-requests-more-names.

[10]The Kansas Constitution does not require senate confirmation of state Supreme Court justices, providing that the governor appoints a justice directly to the court after choosing from three choices sent to her by the lawyer-controlled state nominating commission. *See* Kan. Const. art. 3, § 5.

60-day time limit provision dates to 1957

Second, the provision causing Governor Kelly such consternation was not a new provision added at the time of the adoption of the federal model in 2013. The 60-day gubernatorial appointment timeline was a holdover from the previous judicial selection process—her preferred lawyer-dominated, "nominating commission model" without senate confirmation—that ultimately dates back to 1957.

Supreme Court: 60-day time limit dates to 1957

The provision requiring the Chief Justice to make a judicial appointment if the Governor fails to do so within 60 days exists in the statutes controlling district court appointments and Court of Appeals appointments, as well the constitutional provision controlling Supreme Court appointments. That constitutional provision was originally adopted by Kansas voters in 1957 and created the current nominating commission system for selecting Supreme Court justices.[11]

Court of Appeals: 60-day time limit dates to 1975

When the Court of Appeals was reestablished in 1975, the gubernatorial appointment timeline was included in the statute controlling the appointment of Court of Appeals judges. The provision was modeled from the 1957 constitutional provision and was present in K.S.A. 20-3005 from1975 until its repeal in 2013 when the federal model was adopted.[12] However, as you note in your letter, the Kansas Legislature expressly *maintained* the 60-day gubernatorial appointment timeline presumably based on policy reasons you and others articulated in your testimony supporting reform.[13] In her letter, Governor Kelly suggests that the 2013 reform adding senate confirmation to the selection process somehow caused the current debacle, but she fails to mention that the provision at issue was a *hold-over* provision from previous law dating back to 1975 for the Court of Appeals and ultimately to 1957.

District Court: 30-day and 60-day time limit dates to 1974

Similarly, when the Legislature adopted a nominating-commission-based alternative to elected district court judges in 1974, a gubernatorial appointment time requirement was also adopted.[14] The only distinction is that from 1974 to 2014, the Governor had 30 days to make district court appointments prior to the Chief Justice assuming the duty. This district court selection law was changed in 2014 to make the 60-day timeframe uniformly applicable to district court, Court of Appeals, and Supreme Court appointments.[15]

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[11]*See id.* (originally proposed as L. 1957, ch. 234, § 1).

[12]*See* K.S.A. 2012 Supp. 20-3005 (repealed by L. 2013, ch. 1, § 5.)

[13]This provision is not present in the "pure" federal model contained in the U.S. Constitution in which neither the president's appointment nor the Senate's confirmation process is subject to a time limit. *See* U.S. Const. art. II, § 2, cl. 2.

[14]*See* L. 1974 ch. 137, § 11.

[15]*See* K.S.A. 20-2911; L. 2014 ch. 82, § 20 (changing from 30 days to 60 days timeline for gubernatorial appointments of district court judges prior to Chief Justice assuming appointment power).

Governor Kelly's frustrated appointment was not caused by senate confirmation, it was caused by a provision derived from her own preferred nominating commission process that dates to 1957. If the law is to be changed to prevent statutory deadlines from frustrating gubernatorial appointment vetting and discretion—a policy decision worthy of consideration—it should be changed to uniformly apply to district court, Court of Appeals, and Supreme Court selection processes.

Nevertheless, the Governor's self-made "crisis" of potentially losing her statutory right to fill this vacancy is not a reason in and of itself to engage in ad hoc legislating. Any change made solely to K.S.A. 20-3020 in order to accommodate the Governor under these circumstances would exacerbate the discrepancies between the process for selecting district court, Court of Appeals, and Supreme Court justices.

Accommodating gubernatorial malpractice is not a reason to change the law

If an attorney fails to file a lawsuit before the statute of limitations runs, the attorney is not entitled to a change in law to prevent a malpractice claim. If a political candidate fails to file for office before the filing deadline, the candidate doesn't get to change the law simply to accommodate their mistake. If a Governor is unable to find a qualified candidate before the statutory time to appoint runs, she doesn't get to blame the law and seek a legislative "do over." Accommodating gubernatorial malpractice is not a reason to change the law. Laws should be amended based on reasoned, deliberative arguments for good policy. Changes to the law should reflect a bona fide policy improvement over existing law.

If Governor Kelly is serious about improving the democratic legitimacy of her future appointments, I welcome that discussion. Frankly, despite Governor Kelly and her ad hoc committee of lawyers and political operatives bungling her first judicial appointment, I still support *fewer or no restrictions* on Governor Kelly's appointment power. This is because the federal model—the process in the United States Constitution under which every federal judge has been selected for the past 230 years—is still the best system for selecting Kansas appellate judges. In that system, unfettered executive discretion to *appoint* is checked by an unfettered deliberative process for Senate *advice and consent* to that appointment.

At the end of the day, it is the duly elected Governor who should bear the responsibility for choosing a qualified candidate. No governor, Governor Kelly included, should be forced to select from the nominees of lawyer-controlled commissions. Lawyers and nominating commissions are not a democratically legitimate substitution for the people's elected representatives. As a policy matter, Governor Kelly should be free to select whomever she wants as a judicial nominee. She should be free, as she did for this appointment, to form an advisory committee and consult favored public interest groups if she so chooses. As part of this unfettered discretion, I believe she should not have *any* time restrictions to vet and ultimately make a judicial appointment.

As both you and Governor Kelly know from our previous service together in the Kansas Senate, I have long advocated for senate confirmation of gubernatorially appointed judges. As far back as 2005, during your first year as Senate Majority Leader, you and I co-sponsored a proposed

constitutional amendment to add senate confirmation for Supreme Court justice nominees.[16] Adding senate confirmation to every Kansas judicial appointment is an obvious first step after the Judge Jack debacle: no Kansas appellate or district court judge should ever take the bench in the future without the consent of the people's representatives.

Policy preferences distinct from dictates of current law

However, what Governor Kelly or I wish the law to be does not inform the meaning of current law. As it is, the 60-day time clock triggering an appointment by the Chief Justice is current law. It is current law for Supreme Court appointments, Court of Appeals appointments, and district court appointments. It is current law that dates back to 1957 and was left in the statute when the federal model was adopted for Court of Appeals appointments in 2013. Current law is very straightforward: if the Governor fails to make an appointment within 60 days, the Chief Justice shall make the appointment.

The path to a "definitive answer" regarding the effect of Governor Kelly's attempted appointment and withdrawal of Judge Jack to this vacancy cannot be reached while statutory deadlines are fast approaching. A definitive answer should provide clear and settled guidance, something piecemeal or one-off legislation will not provide. Only new case law or *universally applicable* legislative policy can provide finality on the current issue and predictability for future appointments.

Path toward a "definitive answer"

Immediate concern: possible May 14, 2019 deadline for Senate action

To recap, there are three plausible interpretations of the statute under these circumstances. Assuming the Governor's appointment, withdrawal, or failure to appoint was triggered on March 15, 2019, either: 1) the Chief Justice must now make the appointment; 2) the Governor must make a new appointment by May 14, 2019; or 3) the Senate must vote on the Governor's original appointment of Judge Jack by May 14, 2019.

The third of these plausible scenarios has yet to be fully analyzed. I request that you provide your legal opinion regarding: 1) whether the current circumstances have created the possibility under K.S.A. 20-3020 that Judge Jack's appointment is currently pending before the Senate; and 2) whether the Senate potentially has a duty to vote on that appointment on or before May 14, 2019 or risk consenting to that appointment due to the Senate's "fail[ure] to vote" pursuant to K.S.A. 20-3020(b).

To be clear, I do not believe Judge Jack's appointment is pending before the Senate. Governor Kelly apparently does not either. I raise this issue simply out of an abundance of caution. If in your legal opinion you cannot definitively state that Judge Jack's nomination is withdrawn and

[16]*See* S.C.R. 1606, 2005 Leg., Reg. Sess. (Ks. 2005), *available at* http://www.kansas.gov/government/legislative/bills/2006/2005_1606.pdf.

not currently pending before the Senate, I ask you to seek an immediate judicial determination on this question prior to May 14, 2019.

Litigation is necessary to preserve predictability under all three plausible interpretations

In any event, neither comprehensive reform nor legislation to accommodate the Governor is practically possible prior to May 14, 2019. It would be imprudent to attempt discussions at the end of the legislative session. Even if it were possible to arrange a vote in both legislative bodies during veto session, hastily crafted legislation courts the creation of bad policy.

As a result, I have concluded that at the very least, the *initiation* of litigation by your office is necessary in order to reach a measured resolution to this controversy that will stand the test of time. I request that you initiate a court case on the state's behalf to seek court guidance on the three plausible interpretations of the status of the current vacancy appointment under K.S.A. 20-3020. By filing an appropriate court case, you can request a stay on the current timelines for appointment, including the potential 60-day clock that may apply to either the Senate's consideration of the Judge Jack appointment or the Governor's "do over" appointment. I also request that you seek appropriate temporary injunctive relief to prevent any new purported appointment(s) for this vacancy from causing additional confusion during the pendency of the action.

With a stay on current timelines in place, the Governor and Legislature will have an opportunity to discuss potential legislation to standardize the process for gubernatorially appointed judges under Kan. Const. Art III, K.S.A. 20-3020, and K.S.A. 20-2911. I'd suggest that if no agreement is reached by Sine Die or another designated date, the court case can proceed toward judicial resolution of the current dispute, ultimately providing clear case law on the question of the appropriate appointing authority under these factual circumstances.

Thank you for your legal guidance and even-handedness in helping Governor Kelly, Chief Justice Nuss, and the Senate ensure that the "legitimacy of the next judge is beyond dispute."[17] I look forward to your response.

Sincerely,

Susan Wagle
President of the Kansas Senate

[17]Letter from Derek Schmidt, Kansas Attorney General, to Laura Kelly, Kansas Governor, p. 2 (March 26, 2019).

CC: Governor Laura Kelly
Senate Majority Leader Jim Denning
Senate Minority Leader Anthony Hensley
Speaker Ron Ryckman
Chief Justice Lawton Nuss
Senator Rick Wilborn, Chairman, Senate Judiciary Committee
Senator Eric Rucker, Vice-Chairman, Senate Judiciary Committee
Senator Vic Miller, Ranking Member, Senate Judiciary Committee

IN THE SUPREME COURT OF KANSAS

STATE OF KANSAS *ex rel.* DEREK SCHMIDT, ATTORNEY GENERAL,	)	
Petitioner,	)	
v.	)	**Original Action No. _____**
GOVERNOR LAURA KELLY, in her official capacity;	)	
CHIEF JUSTICE LAWTON R. NUSS, in his official capacity;	)	
and	)	
KANSAS SENATE,	)	
Respondents.	)	

MEMORANDUM IN SUPPORT OF PETITION IN QUO WARRANTO

The State of Kansas *ex rel.* Derek Schmidt, Attorney General, submits this memorandum in support of its Petition in Quo Warranto. For the reasons set forth below, the State requests that quo warranto relief be granted and that it receive such other and further relief as the Court deems just and proper.

STATEMENT OF FACTS

The State has fully set forth the facts of this case in its Petition in Quo Warranto, and it hereby incorporates them into this Memorandum in Support by reference.

ARGUMENT

I. The Court should exercise its original jurisdiction over this quo warranto proceeding.

"An action in quo warranto seeks to prevent the exercise of unlawfully asserted authority." *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, 656, 367 P.3d 282 (2016). Like mandamus, quo warranto "is a proper remedy where the essential purpose of the proceeding is to obtain an authoritative interpretation of the law for the guidance of public officials in their administration of the public business, notwithstanding the fact that there exists an adequate remedy at law." *Cf. Wilson v. Sebelius*, 276 Kan. 87, 90, 72 P.3d 553 (2003) (quoting *State ex rel. Stephan v. Finney*, 251 Kan. 559, 567, 836 P.2d 1169 (1992)). The availability of other forms of relief does not preclude an action in quo warranto. *State ex rel. Coleman v. City of Leavenworth*, 75 Kan. 787, 791, 90 P. 237 (1907) ("The state in the exercise of its high prerogative right to see that the laws are observed and enforced chose the remedy of quo warranto rather than injunction, punishment for contempt, or other civil or criminal proceedings that might have been employed. It is not to be deprived of a remedy expressly given because another may be available.").

Article 3, § 3, of the Kansas Constitution grants this Court original jurisdiction over proceedings in quo warranto. This jurisdiction is concurrent with the district courts, and Rule 9.01 (2018 Kan. S. Ct. R. at p. 58) provides that the Court ordinarily will not exercise original jurisdiction when adequate relief is available in the district court. In this case, the Court should exercise its original

jurisdiction for at least three reasons.

First, there is no need for fact finding by a district judge or by a commissioner as authorized by Rule 9.01(d). This case presents a purely legal question of statutory interpretation.

Second, this case involves a matter of significant public concern. *See State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 52, 687 P.2d 622 (1984) ("This court may properly entertain this action in quo warranto and mandamus if it decides the issue is of sufficient public concern."); *cf. Manhattan Bldgs., Inc. v. Hurley*, 231 Kan. 20, 25-27, 643 P.2d 87 (1982) (the Court may exercise its original jurisdiction over a petition for a writ of mandamus that presents an issue of great public importance or concern). The People of Kansas have a significant interest in ensuring that the next judge on the Kansas Court of Appeals is appointed in accordance with the law. And it is vital that this question be definitely resolved before a new appointment is made and becomes subject to consideration by the Senate. If a new judge is appointed and confirmed and the appointment is later determined to be improper, that could potentially invalidate every Court of Appeals decision in which that judge sat as a panel member. *See Nguyen v. United States*, 539 U.S. 69, 81-83 (2003) (reversing the decision of a federal Court of Appeals because the three-judge panel included a non-Article III judge, even though the other two judges, including the author of the opinion, were Article III judges).

Finally, the parties need an expeditious and authoritative ruling on these

important legal issues. *See State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 265 Kan. 779, 786-87, 962 P.2d 543 (1998) (exercising original jurisdiction over a quo warranto petition when the State asserted "the need for an early, immediate, and final resolution by [the] court of the important legal issues presented"); *cf. Stephens v. Van Arsdale*, 227 Kan. 676, 683, 608 P.2d 972 (1980) (exercising original jurisdiction to provide "an expeditious, authoritative interpretation of the law for the guidance of public officials in the administration of the public business"). If, as the Governor asserts, she has the authority to make a new appointment within 60 days from Judge Jack's withdrawal, the deadline for that appointment appears to be May 17, 2019. And the Legislature will soon be concluding the 2019 Session. If this matter is not resolved by then, the Legislature will be unable to address any defects in the statute or consider any appointment made after the session ends until January 2020.

Recent events have made the need for a prompt ruling even more pressing. On the evening of Friday, April 19, 2019, Governor Kelly expressed her intent to proceed with a new appointee for the Senate to consider during its veto session that begins May 1, 2019. Since President Wagle has publicly stated that she believes Governor Kelly lacks the legal authority to make that appointment, it appears unlikely that the Senate will act on a nominee prior to the expiration of the Legislative session. As such, Governor Kelly's assertion that her new appointment will be deemed confirmed if the Senate does not vote within 60 days adds further urgency to the need for a definitive resolution of with whom the appointing

authority is now vested. Time is of the essence in obtaining a definitive interpretation by this Court of the state of the law to avoid presenting further serious legal questions about operation of the appointment and confirmation process and the legitimacy of the next appointee.

Given the need to quickly resolve this important issue and the existence of a factual record sufficient to make what is a purely legal determination, the State respectfully requests that this Court exercise its original jurisdiction over this action.

II. Quo warranto relief should be granted because Respondents lack the authority to appoint and confirm a nominee to the current Court of Appeals vacancy.

All agree that K.S.A. 2018 Supp. 20-3020 provides the exclusive means for appointing new judges to the Kansas Court of Appeals. But that statute provides no mechanism for making a new appointment when, as here, an original appointment was made within 60 days of the vacancy and the Governor withdrew the appointment before a Senate vote. Accordingly, this Court should grant quo warranto relief declaring that neither the Governor nor the Chief Justice has the legal authority to make an appointment in this situation, and that the Senate therefore lacks authority to grant or withhold its consent as to any person appointed by either of those officials.

K.S.A. 2018 Supp. 20-3020(a)(4) provides: "In event of the failure of the governor to make the appointment within 60 days from the date such vacancy occurred or position became open, the chief justice of the supreme court, with the

consent of the senate, shall make the appointment of a person possessing the qualifications of office."

There is a plausible argument that Governor Kelly, in later withdrawing Judge Jack's appointment, "fail[ed] . . . to make [an] appointment within 60 days" for the vacancy. *See* March 26, 2019, Letter of Attorney General Derek Schmidt (attached to Petition as Exhibit E). But the State believes that under a more natural reading of the statute, "giving ordinary words their ordinary meanings," *see Miller v. Bd. of Cty. Comm'rs, Wabaunsee Cty.*, 305 Kan. 1056, 1059, 390 P.3d 504 (2017) (internal citations omitted), Governor Kelly did make an appointment within 60 days when she announced her appointment of Judge Jack on March 15, 2019. Governor Kelly later withdrew her appointment, thus preventing the Senate from exercising its statutory authority to vote on the appointee, but that does not constitute a "failure of the governor to *make* the appointment[.]" (emphasis added). In other words, under the plain language of the statute, Chief Justice Nuss's authority to make an appointment under subsection (a)(4) was not triggered simply because Governor Kelly reconsidered and withdrew her initial appointment after timely making it.

But just because the appointment authority has not shifted to the Chief Justice does not mean that the Governor is entitled to make a new appointment. K.S.A. 2018 Supp. 20-3020(a)(4) establishes a 60-day deadline from the date of the vacancy for the Governor to make an appointment. We are now well past that deadline. And while K.S.A. 2018 Supp. 20-3020(b) provides a method of resetting

the clock for the Governor in the event the Senate rejects the Governor's appointment, that provision has also not been triggered because the Senate was not given an opportunity to vote on Governor Kelly's nominee.[1] Indeed, Governor Kelly suggested that she withdrew her initial appointment for the specific purpose of *preventing* a Senate vote. *See* March 22, 2019, Letter of Governor Kelly (attached to Petition as Exhibit D) at 4 (arguing that if the Chief Justice was now charged with making the appointment, it would "incentivize a governor to double-down on a doomed appointment" and "incentivize the majority party in the Senate to delay consideration and public discussion of an appointment in order to run out the 60-day clock and force either a withdrawal or a destructive, unnecessary confirmation battle").

Nor can any other provision of the statute plausibly be read as authorizing the Governor to make a new appointment in these circumstances. As the Governor herself acknowledges, "K.S.A. 20-3020 does not explicitly address the event of a withdrawn nomination prior to the Senate voting to reject the nominee." Governor

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[1] Indeed, the plain language of the statute establishes a process that can include a gap in time during which no "clock" is running during the appointment process. The Governor's duty is satisfied when she "make[s] the appointment" within the required 60 days. *See* K.S.A. 2018 Supp. 20-3020(a)(4). But the Senate's 60-day limitation in which to vote does not start to run until "such appointment is *received* by the Senate." K.S.A. 2018 Supp. 20-3020(b) (emphasis added). And that is what happened here. Governor Kelly made her appointment on March 15, 2019 by public announcement, but the Senate Journal for March 15, 2019, shows that no appointment of Judge Jack was ever "received" by the Senate (i.e., the nomination was never "read in" in Senate jargon). Nor was it "received" on any subsequent day. As a result, the Senate Journal does not show the nomination withdrawn because it was never officially "received".

Kelly Letter at 2 (emphasis omitted). Nevertheless, she argues that the statute's silence can be cured by divining what the Legislature would have intended in this scenario.

That argument conflates the interpretation of an ambiguous statutory provision with a situation where a statute simply does not address a particular issue or circumstance. When a statute contains text that could plausibly be interpreted in more than one way (i.e., an ambiguity), "courts must attempt to ascertain legislative intent and in doing so may look to canons of construction, legislative history, the circumstances attending the statute's passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested." *Alain Ellis Living Trust v. Harvey D. Ellis Living Trust*, 308 Kan. 1040, 1046, 427 P.3d 9 (2018) (quoting *State v. Quested*, 302 Kan. 262, 268, 352 P.3d 553 (2015)).

But when a statute is silent on a question, it is not the role of the courts to correct that defect by reading language into the statute based on what the court speculates the Legislature would have preferred (i.e., "gap-filling"). This principle is sometimes known as the "omitted-case canon": "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it. The judge should not presume that every statute answers every question, the answers to be discovered through interpretation." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 93 (2012). When faced with a statutory omission, "[t]he absent provision cannot be supplied by the courts. What the

legislature 'would have wanted' it did not provide, and that is an end of the matter. As Justice Louis Brandeis put the point: 'A *casus omissus* does not justify judicial legislation.' And Brandeis again: 'To supply omissions transcends the judicial function.'" *Id.* at 94 (internal citations omitted) (quoting *Ebert v. Poston*, 266 U.S. 548, 554 (1925) and *Iselin v. United States*, 270 U.S. 245, 251 (1926)).

This Court has long employed the same reasoning, holding that a particular statutory "omission is one for which the legislature is responsible. It is probably a *casus omissus*, which the legislature may, but the court cannot, supply." *State v. Chapman*, 33 Kan. 134, 136, 5 P. 768 (1885). More recently, this Court has explained: "Even if the legislature did not contemplate the occurrence which confronts a court in construing a statute, that court may not supply omissions in a statute. This is true regardless of whether the omission resulted from inadvertence or because the case in question was never contemplated." *State v. Wood*, 231 Kan. 699, 701, 647 P.2d 1327 (1982). Similarly, "[n]o matter what the legislature may have really intended to do, if it did not in fact do it, under any reasonable interpretation of the language used, the defect is one that the legislature alone can correct." *State v. Prine*, 297 Kan. 460, 475, 303 P.3d 662 (2013). That is true in civil as well as criminal cases. *See, e.g.*, *Kenyon v. Kansas Power & Light Co.*, 254 Kan. 287, 293, 864 P.2d 1161 (1993).

In the State's view, the words of the statute are plain and unambiguous and the gap in the statute is obvious: K.S.A. 2018 Supp. 20-3020 simply does not address the circumstance that has arisen here. "Notwithstanding any public policy

considerations and regardless of what one might speculate that the legislature meant to do, the plain language" is dispositive in how this Court reads a statute. *Bussman v. Safeco Ins. Co. of Am.*, 298 Kan. 700, 729, 317 P.3d 70 (2014). "This court cannot . . . supply vital omissions in a statute." *State v. Urban*, 291 Kan. 214, 216, 239 P.3d 837 (2010).

In drafting K.S.A. 2018 Supp. 20-3020, the Legislature apparently failed to contemplate the prospect of an appointment being withdrawn after expiration of the initial 60-day period, so it made no provision for that eventuality. The defect in the statute is one that only the Legislature can cure. *See* March 26 Attorney General Schmidt Letter (recommending a legislative solution to the issue); *see also* https://www.cjonline.com/news/20190401/gov-laura-kelly-seeks-legislative-fix-for-court-of-appeals-nomination-dispute (quoting the chairman of the House Federal and State Affairs Committee as stating, "[the Court of Appeals] was created by the Legislature, . . . and the Legislature should address the issue").

This Court should exercise restraint, decline to speculate how the Legislature might have wished the statute to address this circumstance, and instead leave to the Legislature the task of repairing the statute as it may see fit.

III. If quo warranto relief were to be denied, this Court should determine the proper appointing authority and the applicable timelines.

If this Court disagrees with the State and holds that K.S.A. 2018 Supp. 20-3020 currently authorizes the Governor or the Chief Justice to make a new appointment in these circumstances, then the State respectfully requests this Court

decide and specify which official is the legally authorized appointing authority. Such a decision is necessary to provide much-needed clarity to guide all public officials who are involved in this matter in the performance of their duties. A final and authoritative decision from this Court—regardless of how it rules—would help remove the existing obstacles to the appointment and confirmation of a new Court of Appeals judge. It would also help avoid further dispute and confusion that will inevitably arise from the sharp disagreement between the Governor and the Senate President on whether, and how, to proceed.

In the event this Court were to rule that either the Governor or the Chief Justice is now vested with appointing authority for the current vacancy, the Court also should address what time limits now apply to action by both the appointing authority and the Senate. Given the current situation and timing, further questions about the time limits seem likely to arise if the statute is not repaired by the Legislature: Does the Governor, as she asserts, have a further 60 days from withdrawal of the first appointment in which to make a new appointment? If appointing authority has shifted to the Chief Justice, does the statute impose a 60-day limit, or any time limit, for him to make the appointment? And how does the 60-day limit for Senate consideration operate when an appointment is received so late in the legislative session that the Senate may adjourn well before its 60 days expires? If the Senate adjourns without voting on an appointee before its 60 days expires, is the appointee still deemed confirmed 60 calendar days after the appointment is received by the Senate or does the Senate's time in effect "toll" until

the Senate is again in session? And if the Senate, concerned about a lack of sufficient time to properly consider the nomination, declines to "read in" the appointment from the Governor, has the appointment been "received by the senate" for purposes of starting the 60-day clock for a Senate vote?

Of course, several of these questions (and no doubt others) relate specifically to the Senate and uncertainty about how the requirements of K.S.A. 20-3020 may apply to the Senate's ability to exercise its authority to consent or withhold consent from a subsequent appointee. The State does not presume to speak for the Senate in this matter. The Senate is named as a Respondent and has the opportunity, if it so chooses, to present to this Court its views on these or other questions of timing or process.

A final decision from this Court would forestall future challenges to the legality of a judge's appointment arising from questions about the proper appointing authority and, if coupled with clear guidance on the applicable timelines, preserve the public's confidence in the Court of Appeals.

CONCLUSION

This Court should exercise original jurisdiction over the State's Petition in Quo Warranto and grant the requested relief.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

By: /s/ Derek Schmidt
Derek Schmidt, #17781

Attorney General of Kansas
Jeffrey A. Chanay, #12056
Chief Deputy Attorney General
Toby Crouse, #20030
Solicitor General of Kansas
Dwight R. Carswell, #25111
Assistant Solicitor General
M. J. Willoughby, #14059
Assistant Attorney General
Kurtis Wiard, #26373
Assistant Attorney General

Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: jeff.chanay@ag.ks.gov
toby.crouse@ag.ks.gov
dwight.carswell@ag.ks.gov
mj.willoughby@ag.ks.gov
kurtis.wiard@ag.ks.gov

Attorneys for the State of Kansas ex rel. Derek Schmidt

CERTIFICATE OF SERVICE

The undersigned certifies that on April 22, 2019, a true and correct copy of the above and foregoing was served as per Kan. Sup. Ct. R. 1.11(a) and K.S.A. 60-205(b)(2)(B)(i) by delivering a copy to Respondents' Offices as follows:

Governor Laura Kelly
Office of the Governor
State Capitol
300 SW 10th Ave., Ste. 241S
Topeka, KS 66612-1590

Senate President Susan Wagle
Capitol Office, Room 333-E
300 S.W. 10th Ave.
Topeka, KS 66612

Chief Justice Lawton R. Nuss
Kansas Supreme Court
Kansas Judicial Center
120 S.W. 10th Ave.
Topeka, KS 66612

/s/ Dwight R. Carswell
Dwight R. Carswell

IN THE SUPREME COURT OF KANSAS

STATE OF KANSAS *ex rel.* DEREK SCHMIDT, ATTORNEY GENERAL,	)	
Petitioner,	)	
v.	)	**Case No. 19-121061-S**
GOVERNOR LAURA KELLY, in her official capacity;	)	
CHIEF JUSTICE LAWTON R. NUSS, in his official capacity;	)	
and	)	
KANSAS SENATE,	)	
Respondents.	)	

MOTION TO EXPEDITE

Petitioner, the State of Kansas *ex rel.* Derek Schmidt, Attorney General, moves that this proceeding be expedited given the urgency of the matter. Specifically, Governor Kelly has announced that she intends to make a new appointment to the Court of Appeals for consideration by the Senate during the legislative veto session, which begins May 1, 2019. If she does so and the appointment is valid, the Senate would then have 60 days to confirm or reject the appointment or it is deemed consented to. *See* K.S.A. 2018 Supp. 20-3020(b). But uncertainty about whether any new appointment is in fact valid is likely to create chaos and confusion. This is especially true if the Governor's appointment is deemed

confirmed by the Senate's failure to vote on the appointment because it is no longer in session.

Meanwhile, the Legislature is expected to conclude its 2019 Session soon, after which time it is not scheduled to return until January 2020. If, as the State believes, K.S.A. 2018 Supp. 20-3020 does not currently allow a new appointment for the current vacancy by either the Governor or the Chief Justice, an expedited decision to that effect from this Court would allow the Legislature to address this statutory issue before adjournment either during the legislative veto session or on the day of sine die adjournment. Otherwise, the vacancy could continue to exist for a prolonged period of time, with the Legislature unable to address any statutory fix until January 2020 and the process for making a subsequent appointment able to commence only after that statutory fix is made.

And if the appointment authority is now vested in Chief Justice Nuss, as Senate President Wagle has argued, a speedy determination from this Court would allow him to make an appointment before the Legislature adjourns. Further, if the appointment authority remains vested in Governor Kelly, a speedy determination from this Court would provide clarity for the Governor and the Senate on how to exercise their respective statutory responsibilities in regards to the next appointee during the waning days of the current legislative session.

The State has thoroughly laid out its arguments in its Memorandum in Support of its Petition in Quo Warranto and does not believe additional briefing on its part will be necessary. Therefore, the State requests that the Court call for an

expedited response from Respondents to serve as their briefing and set this case for argument as soon as possible thereafter. Expedited briefing should not pose a significant burden to Respondents: Governor Kelly and President Wagle have already laid out their respective legal analyses in letters to the Attorney General; the Attorney General has likewise provided legal arguments for the Chief Justice's appointment authority in a letter to Governor Kelly.

The State notes that this Court has previously decided original actions in an expedited fashion when the circumstances warranted. *See, e.g.*, *Taylor v. Kobach*, No. 112,431 (Kan. S. Ct.) (petition filed September 9, response due September 15, oral argument September 16, and opinion issued September 18). Similar dispatch is warranted here given the time constraints noted above.

CONCLUSION

The State respectfully requests that this proceeding be expedited.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

By: /s/ Derek Schmidt
Derek Schmidt, #17781
Attorney General of Kansas
Jeffrey A. Chanay, #12056
Chief Deputy Attorney General
Toby Crouse, #20030
Solicitor General of Kansas
Dwight R. Carswell, #25111
Assistant Solicitor General
M. J. Willoughby, #14059
Assistant Attorney General
Kurtis Wiard, #26373

Assistant Attorney General

Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: jeff.chanay@ag.ks.gov
toby.crouse@ag.ks.gov
dwight.carswell@ag.ks.gov
mj.willoughby@ag.ks.gov
kurtis.wiard@ag.ks.gov

Attorneys for the State of Kansas ex rel. Derek Schmidt

CERTIFICATE OF SERVICE

The undersigned certifies that on April 22, 2019, a true and correct copy of the above and foregoing was served as per Kan. Sup. Ct. R. 1.11(a) and K.S.A. 60-205(b)(2)(B)(i) by delivering a copy to Respondents' Offices as follows:

Governor Laura Kelly
Office of the Governor
State Capitol
300 S.W. 10th Ave., Ste. 241S
Topeka, KS 66612-1590

Senate President Susan Wagle
Capitol Office, Room 333-E
300 S.W. 10th Ave.
Topeka, KS 66612

Chief Justice Lawton R. Nuss
Kansas Supreme Court
Kansas Judicial Center
120 S.W. 10th Ave.
Topeka, KS 66612

/s/ Dwight R. Carswell
Dwight R. Carswell