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