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

TO: Hon. Ron Ryckman Jr.
Speaker of the Kansas House of Representatives

FROM: Derek Schmidt
Kansas Attorney General

DATE: March 6, 2020

RE: Kansas Constitutional Amendments on August Primary Election Ballots

This responds to your request for information about Kansas constitutional amendments submitted to the voters on August primary election ballots.

Constitutional Provisions and History
Regarding Proposed Constitutional Amendments

The Kansas Constitution provides, in Article 14, Section 1, that proposed constitutional amendments, when approved by two-thirds of the members of each house of the Legislature, shall be submitted to voters "[a]t the next election for representatives **or a special election called by concurrent resolution of the legislature for the purpose of submitting constitutional propositions**." The Kansas Constitution was amended in 1970 to add this boldface language, which permits constitutional amendments to be submitted to the voters at elections other than the November general elections.

Of course, prior to this amendment, every constitutional amendment had been adopted (or rejected) at a November general election. Since the amendment allowing for special elections, 45 constitutional amendments have been put to a vote. Of these, 29 were considered in November general elections (3 were rejected), 12 in special elections at the August primary elections (1 was rejected), and 4 in special elections at the former April local elections (1 was rejected). *See* List of Amendments and Proposed Amendments to the Kansas Constitution, published in Kan. Stat. Ann. (Constitution Volume). The most recent non-November ballot with a proposed constitutional

amendment was in April 2005, when the voters approved a constitutional amendment regarding the definition of marriage.

According to our research, proposed constitutional amendments have been on the August primary election ballot in three years: 1972, 1974, and 1986. In each instance, there were multiple constitutional amendments on the ballot. Each of the concurrent resolutions proposing one of the amendments stated that the proposed amendment was to be submitted at the next general election, unless the legislature called a special election by concurrent resolution. In each year, a separate resolution was then passed setting a special election on the same date as the primary election, and proposed constitutional amendments were then considered by voters at the special election that coincided with the primary election.

As noted above, the Kansas Constitution specifically provides for the two-thirds majority requirement for concurrent resolutions proposing constitutional amendments. The language added in 1970 provides only for "a special election called by concurrent resolution." Given the specific language of the constitutional provision, it would seem on its face that the two-thirds requirement for concurrent resolutions proposing constitutional amendments is distinct from and does not apply to any separate concurrent resolution calling the special election. Consistent with that conclusion, the rules of the House of Representatives contain a provision identifying actions that require two-thirds majorities, and the calling of special elections is not among them. *See* House Rule 2707. I would note, however, that what appears plain from the Constitution's text has not been tested in practice because each time the Legislature has set a special election date on the August ballot by concurrent resolution separate from concurrent resolutions proposing constitutional amendments, the number of votes cast in favor of the concurrent resolution calling the special election has met or exceeded two-thirds of each house of the Legislature, thus not presenting the question whether a simple majority would have sufficed. HCR 1086 (1972) (approved 36-2, 92-0); SCR 136 (1974) (approved 40-0, 84-0); HCR 5061 (1986) (approved 37-1, 124-1).

Court Decisions Regarding Proposed Constitutional Amendments

The Kansas courts have had only limited opportunities to review constitutional amendment issues, presumably because these matters are committed to the Legislative branch in the first instance and inherently involve political questions. One case of note, decided by the Kansas Supreme Court in 1912, considered the question whether a constitutional amendment not placed on the ballot at the next election could then be placed on a subsequent ballot. The court held that the timing of the vote is the province of the Legislature, and thus legislative action was required to "reset" the vote: "the remedy lies with the Legislature, which can provide for the submission of the question at a later time, if it regards such course as expedient." *Dawson v. Sessions*, 87 Kan. 497, 124 P. 403, 405 (1912). This case signals judicial deference to the Legislature's discretion in the scheduling of amendment votes.

Significantly, the Kansas Supreme Court has set a high bar for reversing the actions of the Legislature in connection with concurrent resolutions proposing constitutional amendments. In a case which ultimately held that a constitutional amendment was improperly submitted, the court articulated the high standard for reviewing such actions of the Legislature:

> We also refer to the rule that the constitutionality of a statute or concurrent resolution is presumed, and that all doubts must be resolved in favor of their validity, and before they may be stricken down, it must appear the infringement of the Constitution is clear beyond substantial doubt. **It is the court's duty to uphold the concurrent resolutions, rather than defeat them, and if there is any reasonable way to construe them as constitutionally valid, that should be done.**

Moore v. Shanahan, 207 Kan. 645, 486 P.2d 506, 512 (1971) (emphasis added). This language, with its admonition that the issue must be "clear beyond a reasonable doubt," presents a strong obstacle to any court challenge to a proposed constitutional amendment.

Notwithstanding this standard, it should be noted that the court in *Moore* did strike down a proposed constitutional amendment, stating the view that "the power of the Legislature to initiate any change in the Constitution . . . is to be strictly construed under the limitations by which it is conferred." 486 P.2d at 513. According to the *Moore* court, the Legislature does not exercise ordinary legislative power when proposing constitutional amendments, but acts in the nature of a "convention expressing the supreme will of the people." *Id.* The court ultimately found that the Legislature exceeded that "limited power" when it submitted a proposed constitutional amendment containing multiple subject matters inconsistent with the language of Article 14, Section 1, as it existed at that time.

Conclusion

The language of the Kansas Constitution appears plain on its face: The two-thirds vote requirement attaches to concurrent resolutions proposing constitutional amendments but does not attach to separate concurrent resolutions setting a special election date for voters to consider such proposed constitutional amendments. The case law and plain constitutional text suggest strongly that a simple majority would be sufficient to adopt a concurrent resolution setting a special election to consider a separately proposed constitutional amendment. However, no Kansas court has decided this question since the Constitution was amended in 1970 to allow public votes on constitutional amendments at non-November elections, and the Kansas Supreme Court's approach to interpreting law can sometimes be difficult to predict. *See generally, e.g.*, *Kansas v. Garcia*, No. 17-834, 2020 WL 1016170, at *7 (U.S. Mar. 3, 2020)(Kansas Supreme Court's interpretation of written text "flatly contrary to standard English usage"); *Hodes & Nauser v. Schmidt*, 309 Kan. 610, 660 (2019) (discovering in Kansas constitution a right to "bodily integrity" not apparent in the text nor previously discovered in 158 years of state history); *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1144 (2019) (abrogating constitutional test for applying right to jury trial that court had announced only seven years earlier); *State v. Marsh*, 278 Kan. 520, 577 (2004) (McFarland, C.J., dissenting) (criticizing majority for abandoning three-year-old constitutional precedent when "nothing has changed except the composition of the court").