ELECTRONICALLY FILED
2015 Dec 07 PM 2:47
CLERK OF THE APPELLATE COURT
CASE NUMBER: 114573

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 114,573

LARRY T. SOLOMON, CHIEF JUDGE,
30TH JUDICIAL DISTRICT OF THE STATE OF KANSAS,
Appellee,

v.

STATE OF KANSAS,
Appellant.

ORDER

Per curiam: This matter comes before the court on the State's motion requesting recusal of all seven justices of this court and replacement by 7 or 14 judges from the Kansas Court of Appeals. The motion arises in the State's appeal from a district court decision declaring part of 2014 Senate Substitute for House Bill 2338 (HB 2338) an unconstitutional infringement of the Supreme Court's "general administrative authority" over all courts. See Article 3, section 1 of the Kansas Constitution.

For the reasons explained below, we conclude that no justice is compelled by the Kansas Code of Judicial Conduct or other law to recuse. Judge Solomon's response to the motion and the State's reply are noted.

The law at the heart of this appeal, HB 2338, amended K.S.A. 20-329 and became effective July 1, 2014. Generally speaking, two of its provisions are in issue. The first, Section 11, changes how chief judges of the 31 judicial districts have been selected:

> Section 11: "In every judicial district, *the district court judges in such judicial districts shall elect a district judge as chief judge* who shall have general control over the assignment of cases within the district, subject to supervision by the supreme court. The procedure for such election shall be determined by the district court judges and adopted by district court rule." (Emphasis added.) L. 2014, ch. 82, sec. 11.

In Chief Judge Solomon's suit filed on February 18, 2015, he challenged the constitutionality of this provision, particularly pointing to Supreme Court Rule 107(a) (2015 Kan. Ct. R. Annot. 202), which, when combined with its predecessor, has provided for more than 45 years that "[t]he Supreme Court will appoint a chief judge in each judicial district." (Petition p. 4). As the court's authority for creating and applying this rule, he relied upon Article 3, section 1 of the Kansas Constitution, which since 1972 has provided: "The supreme court shall have general administrative authority over all courts in this state."

The second provision of HB 2338 at issue is Section 43, a nonseverability clause. It provides:

> Section 43: "The provisions of this act are not severable. If any provision of this act is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of such act without such stayed, invalid or unconstitutional provision." L. 2014, ch. 82, sec. 43.

Judge Solomon argued that because Section 11 was unconstitutional, Section 43 made the entire act invalid. Examples of other sections that consequently would be invalidated include Section 1 (among other things, appropriating $2 million in state general funds to the judicial branch); Section 2 (giving chief judges the option of preparing and submitting a budget for their judicial districts, contrary to the Supreme Court's procedure of submitting a budget for the entire judicial branch); and Section 22

(giving Court of Appeals judges the authority to elect their own chief judge, contrary to long-standing procedure of appointment by Supreme Court).

The district court acknowledged the State's argument that 2015 House Bill 2005 (HB 2005) also played a part, particularly its own nonseverability clause concerning HB 2338. The court recognized HB 2005 contains appropriations for the judicial branch for fiscal years 2016 (beginning July 1, 2015) and 2017 (beginning July 1, 2016). Its Section 29 provides:

> "If any provision of . . . *2014 Senate Substitute for House Bill No. 2338* . . . is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of *this* act without such stayed, invalid or unconstitutional provision and the provisions of *this* act are hereby declared to be null and void and shall have no force and effect." (Emphasis added.) L. 2015, ch. 81, sec. 29 (Order pp. 32-33.)

The State therefore posited that judicially holding Section 11 of HB 2338 to be unconstitutional would invalidate all HB 2005 judicial branch appropriations for fiscal years 2016 and 2017. (Order p. 33.)

After oral arguments on competing dispositive motions, on September 2, 2015, the district court ruled for Judge Solomon as follows:

> "[Section] 11 of 2014 Senate Substitute for House Bill 2338 violates the separation of powers doctrine in Kansas and is, thus, unconstitutional. This also necessitates the invalidation of the remainder of 2014 Senate Substitute for House Bill 2338 by virtue of the nonseverability provision contained in [Section] 43 of that bill, as agreed by both parties. . . . Moreover, because the effect this decision will have on [Section] 29 of 2015 House Bill 2005 exceeds the scope of this Memorandum Decision and Order, the Court declines to address it." (Order p. 35.)

ANALYSIS

State's arguments in support of recusal

In its 22-page motion, the State alleges all seven justices should recuse for two basic reasons:

A. Partiality because of a Supreme Court conflict: The scope and authority of the Supreme Court's "institutional power is *the ultimate issue* in this case," and so the court cannot impartially adjudicate the dispute. (Mot. p. 4.)

B. Partiality because of statements to the public and relationships with Judge Solomon:

1. Through written testimony provided to the Senate Judiciary Committee, the chief justice publicly opposed that part of eventual HB 2338 giving chief judges the option of preparing and submitting a budget for their judicial districts, and his general counsel publicly opposed that part of eventual HB 2338 changing the chief judge selection process. (Mot. p. 4.)

2. Through an opinion column published in multiple Kansas media outlets after the Senate passed HB 2338 but before the House of Representatives had voted, the chief justice "effectively, if not explicitly, suggested that the new law may violate that constitutional provision [which expresses the supreme court's 'general administrative authority over all courts in this state']." (Mot p. 5.)

3. Through its media release after HB 2338 became law, the court was "harshly critical of the law at issue in this case." (Mot. p. 5.)

4. The court has a "unique and close relationship with" the plaintiff, Judge Solomon, which demonstrates its bias in favor of him. (Mot. p. 6.)

The State specifically argues the following canons or rules of the Kansas Code of Judicial Conduct (KCJC) (Supreme Court Rule 601B [2015 Kan. Ct. R. Annot. 745 *et seq.*]), call for the full court's recusal: Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.") and its accompanying Rule 1.2 (2015 Kan. Ct. R. Annot. 753); Canon 2 ("A judge shall perform the duties of judicial office impartially, competently, and diligently.") and its accompanying Rule 2.11(A)(1), (2), and (4) (2015 Kan. Ct. R. Annot. 755). The State claims that "at a bare minimum, [the justices' conduct] would *appear* to a reasonable observer to violate the Code [of Judicial Conduct] and such appearance alone is sufficient to require recusal." (Mot. p. 7.) Rule 1.2 provides the test for examining judicial conduct for the appearance of impropriety: "whether the conduct would create in reasonable minds a perception that the judge violated [the Kansas canons of judicial ethics] or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Canon 1, Rule 1.2, comment 5 (2015 Kan. Ct. R. Annot. 754).

In its further discussion on judicial ethics, the State also cites Canon 2, Rule 2.2 (2015 Kan. Ct. R. Annot. 755) and Rule 2.10(A) and (B) (2015 Kan. Ct. R. Annot. 761), which deal with impartiality and fairness and judicial statements on pending and impending cases; and Canon 3, Rule 3.1(C) (2015 Kan. Ct. R. Annot. 766) and Rule 3.2 (2015 Kan. Ct. R. Annot. 768), which deal with extrajudicial activities and appearances before governmental bodies and consultation with government officials.

The State additionally argues our recusal is necessary under federal due process principles. See, *e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (due process violated when, under all the circumstances, probable risk of actual bias is too high to be constitutionally tolerable).

Discussion

"A judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to (a) the judge has a personal bias or prejudice concerning a party . . . ." Canon 2, Rule 2.11(A)(1) (2015 Kan. Ct. R. Annot. 761). The Canons define impartiality as "absence of bias or prejudice in favor of, or against, particular parties . . ., as well as maintenance of an open mind in considering issues that may come before a judge." KCJC, Rule 601B, Terminology (2015 Kan. Ct. R. Annot. 748); see *Liteky v. United States,* 510 U.S. 540, 552, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (bias, prejudice, and partiality apply "only to judicial predispositions that go beyond what is normal and acceptable").

Disqualification of a judge is appropriate when the circumstances and facts of the case "create reasonable doubt concerning the judge's impartiality, *not* in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in the mind of a reasonable person with knowledge of *all* the circumstances." (Emphasis added.) *State v. Logan,* 236 Kan. 79, 86, 689 P.2d 778 (1984). The Kansas standard echoes those in other courts, whose caselaw requires judges to determine "whether a reasonable person—if fully informed of the facts and circumstances underlying the grounds on which disqualification is sought, *as well as the 'facts of life' that surround the judiciary*—would harbor significant doubts about the judge's impartiality." (Emphasis added.) Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, § 5.8,

p. 134 (2d ed. 2007). This reasonable person has been described as the "reasonable, well-informed observer." *Matter of Mason,* 916 F.2d 384, 387 (7th Cir. 1990) ("Reasonable, well-informed observers of the federal judiciary understand that judges with political friends or supporters regularly cast partisan interests aside and resolve cases on the facts and law."). The standard is an objective one. See *Kansas Judicial Review v. Stout*, 287 Kan. 450, 473-74, 196 P.3d 1162 (2008).

1. *Partiality because of Supreme Court conflict*

We begin our analysis by acknowledging that a judge has "'as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.'" *Bryce v. Episcopal Church in Diocese of Colorado*, 289 F.3d 648, 659 (10th Cir. 2002) (quoting *Nichols v. Alley*, 71 F.3d 347, 351 [10th Cir. 1995]). Likewise, we acknowledge our Kansas canons require that when hearing a case, "[a] judge shall uphold and apply the *law,* and shall perform all duties of judicial office fairly and *impartially*." Kansas Code of Judicial Conduct, Canon 2, Rule 2.2 (2015 Kan. Ct. R. Annot. 755). And "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." Comment [2].

Because of our alleged conflict, the State contends that Court of Appeals judges should replace all the members of this court. But it is clear all Kansas district judges and Court of Appeals judges have some stake in the central subject of this appeal: the constitutionality of a law (HB 2338) that calls not only for local district judges, but also for all Court of Appeals judges, to now elect their chief judge instead of those chief judges being appointed by the Supreme Court.

Based upon one of the State's expressed rationales calling for the justices' recusal—*i.e.*, we have "a direct stake in the outcome of litigation" (Mot. p. 1)—all other state court judges also would be disqualified from hearing this case. Indeed, the State expressly admits that no assigned district judges or senior/retired judge can "cure any appearance of partiality problems" on this appeal. (Mot. p. 20.) And, like the district judges, the Court of Appeals judges not only have a stake in where the power resides for their chief judge selection but also the potential for a personal, professional, and institutional financial interest in whether their judicial branch is adequately funded. This specific interest is implicated by the nonseverability sections of both HB 2338 and HB 2005, whose application potentially eliminates their bills' funding.

More particularly, per HB 2338, $2 million in state general funds were appropriated for the judicial branch as well as a projected $6.2 million in new or increased user fees of which $3.1 million was earmarked for electronic case filing. But not all of these funds appropriated for the fiscal year ending June 30, 2015, necessarily have been spent. Any remaining funds are thus subject to loss. And the same potential loss would be implicated for funds appropriated in HB 2005, which waits just offstage in this appeal. HB 2005 contains state general fund appropriations for the entire judicial branch of $101.9 million for fiscal year 2016 and $105.7 million for 2017—and millions more from other sources.

We also observe that the State never sought the recusal or disqualification of the district judge from whose order it now appeals. He too had a stake in the power to elect his chief judge as well as the potential for a personal, professional, and institutional financial interest. We further observe that while a similar issue of financial stake, *i.e.*, medical insurance by the same company for virtually all state judges, was present in an earlier case, the district judge did not recuse. See *Blue Cross & Blue Shield of Kansas, Inc. v. Sebelius*, Docket Nos. 02-C-340, 02-C-341, 2002 WL 32136264, at n.5 (Kan. 3d

Jud. Dist. Ct. June 7, 2002) ("For this reason, the court initially considered recusing from this case. Upon further reflection, however, it became obvious that all other judges in Kansas would have the same problem [as BCBS insures the entire Kansas judiciary]."). And despite being insureds of the plaintiff, none of the covered justices recused for this reason. See *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger*, 276 Kan. 232, 75 P.3d 226 (2003).

With these points established, we proceed to analyze other issues raised by the State.

2. *Partiality because Supreme Court's institutional power at stake*

The State argues all the justices must recuse because the Supreme Court's "institutional power" is the ultimate issue in this case (Mot. p. 4), *i.e.*, its authority is at stake. In other words, the court's long-standing practice of selecting all chief judges is being replaced statutorily by the votes of judges on the lower courts themselves.

But having this court's "institutional power" at stake is not a basis for recusal of the justices. Simply put, the question of that authority is frequently answered by the courts themselves. In *State ex rel. Stephan v. O'Keefe,* 235 Kan. 1022, 1035-36, 686 P.2d 171 (1984), this court held that the practice of law was entwined with the exercise of judicial power in the administration of justice. Consequently, this court prohibited a district judge from usurping the Supreme Court's power by appointing unlicensed prisoners to represent fellow prisoners in civil actions. See *Petersilie v. McLachlin,* 80 Kan. 176, 180, 101 P. 1014 (1909) (holding unconstitutional a legislative declaration of truth of facts because it invaded the province of the judicial branch). As for a direct challenge to a supreme court's "institutional power" to set its own deadlines for releasing decisions, with one exception, "every single high court has concluded it is an inherently

judicial task to determine when to render a judicial decision, and the separation of powers bars legislatures from telling courts when to do so." *In re Allcat Claims Service, L.P.,* 356 S.W.3d 455, 489 (Tex. 2011) (Willett, J., concurring in part and dissenting in part); see *Coate v. Omholt,* 203 Mont. 488, 492, 662 P.2d 591 (1983).

Similarly, last year in the school finance case of *Gannon v. State*, 298 Kan. 1107, 1134-1161, 319 P.3d 1196 (2014), we rejected the State's argument that a specific issue was not justiciable—*i.e.*, unable to be decided by the court because it was a political question solely within the legislature's province. See also *Van Sickle v. Shanahan*, 212 Kan. 426, 438-40, 511 P.2d 223 (1973) (same).

It is equally true that when this court is called upon to consider the constitutionality of statutes that potentially violate the separation of powers doctrine by impinging on the court's power, it also must, and does, refuse to assert its power when a litigated issue falls within the power of the legislature. See, *e.g.*, *State ex rel. Morrison v. Sebelius,* 285 Kan. 875, 912, 179 P.3d 366 (2008) (holding statute violates constitutional separation of powers by seeking an advisory opinion by the court that would usurp the legislature's duty to make a preliminary judgment on the constitutionality of inoperative legislative provisions); *Leek v. Theis,* 217 Kan. 784, 813-16, 539 P.2d 304 (1975) (concluding specific issue was nonjusticiable political question solely within the legislature's province).

If having the court's institutional power at stake were a valid basis for recusal, this court frequently would be unable to fulfill its constitutional duty to the people of Kansas to be the "'sole arbiter of the question of whether an act of the legislature is invalid under the Constitution of Kansas.'" *Gannon*, 298 Kan. at 1161; see *Auditor of State v. A.T. & S.F. Railroad Co.*, 6 Kan. 500, 506, 1870 WL 507 (1870) ("'It is emphatically the province and duty of the judicial department to say what the law is.'") (quoting *Marbury*

v. Madison, 5 U.S. [1 Cranch] 137, 2 L. Ed. 60 [1803]). Such frequent and wholesale recusals certainly would be inconsistent with this court's description of its solemn approach to its duty to determine constitutionality: "However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it." *Harris v. Shanahan*, 192 Kan. 183, 206-07, 387 P.2d 771 (1963); see also *In re P.L. 2001, Chapter 362*, 186 N.J. 368, 393, 895 A.2d 1128 (2006) (court's "solemn responsibility" to strike down statute that runs afoul of either federal or state constitution).

Related to this court's view of its duties is its decision in the attorney disciplinary matter of *State v. Rome*, 235 Kan. 642, 685 P.2d 290 (1984). There, the respondent attorney argued for all the justices' recusal, which the court interpreted as a challenge under Rule 601, Canon 3C(1). It provides: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned." 235 Kan. clxv. Specifically, the respondent argued recusal was required: (1) because of the justices' involvement in his removal from the bench 3 years earlier for misconduct, see *State ex rel. Comm'n on Judicial Qualifications v. Rome*, 229 Kan. 195, 623 P.2d 1307 (1981); (2) because of his lawsuit in federal court against them; and (3) because he favored partisan election of all judges while "this court is allegedly 'on record for its opposition to the election of judges by the people.'" 235 Kan. at 649. This court rejected these arguments based in part upon its recognition of its duty to supervise the practice of law. 235 Kan. at 650.

3. *Rule of necessity*

To the extent any financial interests of the justices might be at stake, the rule of necessity would nevertheless require that we do not recuse on this basis. The rule essentially provides: "'The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest . . . where no one else can take

his place—it is his duty to hear and decide, however disagreeable it may be.'" *United States v. Will*, 449 U.S. 200, 214, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980) (quoting *Philadelphia v. Fox*, 64 Pa. 169, 185 (1870); *Barber County Comm'rs v. Lake State Bank*, 123 Kan. 10, 15, 254 P. 401 (1927) (same).

In short, "[t]he rule of necessity may override the rule of disqualification." Rule 2.11, comment 3 (2015 Kan. Ct. R. Annot. 763.) In *United States v. Will*, 449 U.S. at 212-17, the rule of necessity allowed the Supreme Court justices to hear a challenge to statutes reducing federal judicial compensation, including their own. See, *e.g.*, *In re P.L. 2001, Chapter 362*, 186 N.J. 368 at 393 (justices applied rule of necessity, holding that when a statute interferes with the administration of the judiciary, they could not escape their constitutional responsibility to decide the legislation's validity "even if there is some perception that the result may be tinged by self-interest."); *State ex rel. Nebraska State Bar Assn. v. Rhodes*, 177 Neb. 650, 659, 11 N.W.2d 118 (1964) (applying rule of necessity despite respondent attorney's claim all justices were also members of the state bar association—because so too were all district judges who would need to be called if the justices were disqualified). In short, "[t]he rule of necessity provides for the effective administration of justice while preventing litigants from using the rules of recusal to destroy what may be the only tribunal with power to hear a dispute." *Glick v. Edwards,* 803 F.3d 505, 509 (9th Cir. 2015).

4. Partiality by public statements attributed to the chief justice

The State appears to suggest that, notwithstanding some, if not all, of these points, all justices should nevertheless be replaced with Court of Appeals judges because the justices are "more partial" than these judges due to public statements "opposing and criticizing the law." In support of this claim, throughout the State's motion and reply, it

faults three public statements it attributes to the chief justice and one public statement attributable to the entire court.

In each statement attributed to the chief justice, either he or his general counsel questioned the need for the legislation and certainly did not support it. The State treats all three of these statements as inappropriate prejudging, or the appearance of inappropriate prejudging, of the constitutional issue before the court in this appeal.

The principal weakness in the State's written arguments filed in this court and its overall appellate position—as advanced by the Attorney General—is its failure to acknowledge a critical distinction articulated more than 50 years ago by a previous Kansas attorney general, Harold Fatzer, when, as Justice Fatzer, he authored an opinion for this court on the separation of powers. He wrote:

> "It is sometimes said that courts assume a power to overrule or control the action of the people's elected representative in the legislature. This is a misconception . . . [*C*]*ourts have no power to overturn a law enacted by the legislature within constitutional limits, even though the law may be unwise, impolitic or unjust.* [But] [i]n the final analysis, this court is the sole arbiter of the question of whether an act of the legislature is invalid under the Constitution of Kansas." (Emphasis added.) *Harris v. Shanahan*, 192 Kan. at 206.

Stating this important distinction another way: "[I]n addressing constitutional issues, courts are only concerned with whether the legislature had the power to enact the statute, not the wisdom behind it." *In re Property Evaluation Appeals of Various Applicants*, 298 Kan. 439, 447, 313 P.3d 789 (2013) *cert. denied sub nom. Missouri Gas Energy v. Kansas Div. of Prop. Valuation*, 135 S. Ct. 51 (2014). As we stated more expansively in *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 348-49, 789 P.2d 541 (1990):

> "*Our constitution does not make this court the critic of the legislature* . . . . When a legislative act is appropriately challenged as not conforming to a constitutional mandate, the function of the court is to lay the constitutional provision invoked beside the challenged statute and decide whether the latter squares with the former—that is to say, *the function of the court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy.*" (Emphasis added.)

The State's omission of this vital distinction—judicial review for constitutionality and not for wisdom of policy—is puzzling because the State clearly recognized this same distinction in this very case several months ago. It argued to the district court: "A statute either infringes on the Kansas Supreme Court's general administrative authority or it doesn't; the fact that the Kansas Supreme Court may disagree with the statute on policy grounds is irrelevant." (Memorandum in Support of Motion to Dismiss, p. 9.) And the State reinforced this point in its next paragraph: "[I]n determining whether a statute passed by the Legislature is constitutional, the courts must employ a *legal* standard—something more than whether the Supreme Court agrees with the statute or would instead prefer some other rule."

With this critical distinction in mind, we examine the three statements the State relies upon to argue that the chief justice—and by association, all the justices of the supreme court—are "more partial" than all of the judges of the Court of Appeals. In this examination, we first will determine whether any of these public statements actually expressed prejudgment of HB 2338's constitutionality through an exercise of this court's obligatory, limited review described in *Harris v. Shanahan,* 192 Kan. at 206, or, instead, maintained the distinction drawn in *Harris* and expressed an opinion pursuant to a justice's nonobligatory, but nonetheless authorized, disagreement with legislative policy. See, *e.g.*, K.S.A. 20-101 ("As provided by section 1 of article 3 of the Kansas constitution, the supreme court shall have general administrative authority over all courts

in this state, and the supreme court and each justice thereof shall have such specific powers and duties in exercising said administrative authority as may be prescribed by law.").

First, the written testimony of the general counsel presented to the Senate Judiciary Committee on February 17, 2014—as approved by the chief justice—concerned the legislative change in the chief judge selection process. It simply stated that the change "*appears to conflict* with the provisions of Article 3, Section 1, of the Constitution." (Emphasis added.)

Second, the written testimony authored by the chief justice and presented to the Senate Judiciary Committee on February 17 did not address the chief judge selection issue. Rather, his testimony concerned legislation allowing chief judges to prepare, submit, and administer individual budgets for their own judicial districts (Senate Bill 364), which later became part of HB 2338. The chief justice wrote that SB 364

> "*appears to reject* the 'mandate from the people of Kansas' to modernize the Kansas judicial system per amended Article 3 of the Kansas Constitution. . . . And SB 364 *appears contrary* to the recommendations of the 1974 JSAC [Judicial Study Advisory Committee] report, as well as to the recommendations in the most recent study of the Judicial Branch—the Blue Ribbon Commission (BRC) report of January 2012." (Emphasis added.)

The chief justice's written testimony further provided:

> "[I]f there is absolutely no question about the constitutionality of SB 364 , then at a minimum why not have a thorough study of this proposed change—as was done in the later 1960's and again in the early 70's?"

Finally, the chief justice's op-ed piece of March 2014 that was published in various newspapers expressly stated: "Some argue this Senate action violates the people's constitution. . . . I express no opinion on the constitutionality of the package [including HB 2338] because if it is challenged in a lawsuit the Supreme Court may need to answer that question."

According to the State's docketing statement, the constitutionality of the chief judge selection provision in HB 2338 is being challenged on appeal and is the precise question the Supreme Court will "need to answer." The question is not whether the provision is "unwise, impolitic, or unjust." *Harris v. Shanahan*, 192 Kan. at 206.

A judge or justice of Kansas may disagree with the public policy underlying or contained within certain legislation. But as Justice Fatzer wrote, such disagreement is not a consideration when reviewing that legislation for compliance with the constitution of the people of Kansas. This specific principle echoes Comment [2] to Rule 2.2 of the KCJC (2015 Kan. Ct. R. Annot. 755), which provides: "Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question."

In addition to meeting these obligations, when reviewing a statute for constitutionality this court traditionally has employed presumptions and standards that weigh considerably in favor of upholding the statute:

> "'[T]he separation of powers doctrine requires a court to presume a statute to be constitutional. [Citation omitted.]" A statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so." [Citation omitted.]'" *State ex rel.*

Six v. Kansas Lottery, 286 Kan. 557, 562, 186 P.3d 183 (2008) (citing *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84, 179 P.3d 366 [2008]).

Simply put, "[a] statute must clearly violate the constitution before it may be struck down." *In re Appeals of Various Applicants*, 298 Kan. at 447.

Rather than a prejudgment of the constitutional question before this court, we conclude the three documents contained comments consistent with the chief justice's constitutional and statutory roles to address public policy matters affecting the judiciary. See, *e.g.*, K.S.A. 20-101 ("The chief justice shall be the spokesman for the supreme court and shall exercise the court's general administrative authority over all courts in the state."). See also Canon 2, Rule 2.10(D) (2015 Kan. Ct. R. Annot. 761) ("a judge may make public statements in the course of official duties"); Canon 3, Rule 3.2, Comment [1] (2015 Kan. Ct. R. Annot. 768) ("Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies.").

Similarly, in *In re P.L. 2001, Chapter 362*, 186 N.J. at 390, the New Jersey Supreme Court noted that before the legislature passed an act involving probation officers, the court had "made clear that the important judicial role played by probation officers in the court system *could not be reconciled* with arming them with guns . . . ." (Emphasis added.) 186 N.J. at 390. The court continued: "Despite those *judicial policy pronouncements,* the Legislature enacted a law authorizing probation officers to 'carry . . . firearm[s].'" (Emphasis added.) 186 N.J. at 390. The court later found the act unconstitutional.

We next consider whether any of these statements otherwise requires recusal, *i.e.*, produces an appearance of inappropriate prejudging of the constitutional issue that the State identified in this appeal.

Our general view in Kansas on the function of jurists—especially when reviewing a statute under a constitutional challenge and recognizing the vital distinctions expressed in *Harris v. Shanahan*,—is in step with the general rule regarding their disqualification. "[T]here exists a strong presumption against disqualifying a judge solely on the basis of her views about public policy, or even the policy underlying the specific law she is bound to apply in a particular case." Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, § 10.7, p. 272 (2d ed. 2007). Moreover, "[a] judge's views on matters of law and policy ordinarily are not legitimate grounds for recusal, *even if such views are strongly held*." (Emphasis added.) *United States v. Snyder*, 235 F.3d 42, 48 (1st Cir. 2000) (citing Flamm). *Cf. Liteky v. United States*, 510 U.S. 540, 550, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) bias, prejudice, and partiality apply "only to judicial predispositions that go beyond what is normal and acceptable").

Even publicly expressing a viewpoint on the law is not itself grounds for disqualification. "[A] judge's expression of a viewpoint on a legal issue, in and of itself, is generally not deemed to provide a legitimate basis for disqualification. This is usually true without regard to where such judicial views were expressed . . . ." Flamm, § 10.9, p. 278. "[J]udges are not disqualified merely because they have previously announced their positions on legal issues." *Association of Nat. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1177 (D.C. Cir. 1979) (Leventhal, J., concurring) (citing *F.T.C. v. Cement Institute,* 333 U.S. 683, 701, 68 S. Ct. 793, 92 L. Ed. 1010 [1948]). As one court explained:

> "[I]t is also presumed that a judge will not prejudge any case. In each new case the judge confronts a new factual context, new evidence, and new efforts at persuasion. As long as

> the judge is capable of refining his views in the process of this intellectual confrontation, and maintaining a completely open mind to decide the facts and apply the applicable law to the facts, *personal views on law and policy do not disqualify him from hearing the case. The test may be stated in terms of whether the judge's mind is 'irrevocably closed' on the issues as they arise in the context of the specific case.* See *FTC v. Cement Institute*, 333 U.S. 683, 701, 68 S. Ct. 793, 803, 92 L. Ed. 1010 (1948); see also *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 493, 96 S. Ct. 2308, 2314, 49 L. Ed. 2d 1 (1976) ('Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances."'); *United States v. Haldeman*, 559 F.2d 31, 136 (D.C. Cir. 1976) (en banc) (per curiam) ('a judge's comment is disqualifying only if it connotes a fixed opinion—"a closed mind on the merits of the case."'), *cert. denied*, 431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977)." *Southern Pacific Communications Co. v. A.T.&T.*, 740 F.2d 980, 991 (D.C. Cir. 1984).

In sum, "[a]n appellant therefore must show that a judge's mind was 'irrevocably closed' on the issue before the court." *S.E.C. v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1222 (1989) (citing *A.T.&T.*, 740 F.2d at 991; *FTC v. Cement Institute*, 333 U.S. at 701; and *United States v. Haldeman*, 559 F.2d 31, 136 [D.C. Cir. 1976]). *Cf. State v. Foy*, 227 Kan. 405, 607 P.2d 481 (1980) (general public statements—even those saying what the law should be and indicating some disagreement with existing legal procedures—do not constitute a statement of personal bias).

While examples abound of judges denying recusal motions after expressing themselves on particular points of law, the case of *Judicial Inquiry Com'n of W. Va. v. McGraw*, 171 W. Va. 441, 299 S.E.2d 872 (1983), has many parallels to the question before us today. There, the West Virginia legislature had deleted certain items from the judicial budget for a fiscal year. A justice on the state's high court, the Supreme Court of

Appeals, then made certain public comments regarding the judiciary's independent budget-making power under the West Virginia Constitution, which included:

> "'We probably feel a devotion to an independent judiciary, which some people in the past have not felt. And the Constitution quite clearly says that the three branches of government—three departments, in the case of West Virginia—are separate, distinctive and independent and probably our court is determined to vindicate that separation.' Charleston Gazette, March 31, 1978 at 11.
>
> "'*Now, as a practical matter, we have long recognized that certain members of the legislative leadership resent the fact that the judiciary does not have to come before the legislature bowing and scraping and pleading for funds.*
>
> . . . .
>
> "'*But their conduct with regard to our budget does not represent an attempt at fiscal integrity or fiscal belt-tightening. It represents nothing less than an attack on the independence of the judiciary.*' Charleston Gazette, April 3, 1978 at 10B. (Emphasis added.) 171 W. Va. at 442 n.3."

Following the justice's comments, an original mandamus suit was filed in the Supreme Court of Appeals, *State ex rel. Bagley v. Blankenship*, 161 W. Va. 630, 246 S. Ed. 2d 99 (1978), which sought to compel restoration of the budget cuts because they violated a state constitutional "right to an independent judicial budget." *McGraw*, 171 W. Va. at 443. The respondents then filed a motion to recuse the justice who had made the comments, "claiming that his prior statements relating to the independent judicial budget foreclosed his ability to impartially hear the mandamus action which involved the same issue." 171 W. Va. at 443. They alleged bias, prejudice, partiality, and due process violations.

The justice did not recuse. Rather, he concurred and joined in the court's decision and opinion—which held the legislative alteration to the budget was unconstitutional. *McGraw*, 171 W. Va. at 443 n.4. On these facts, the Supreme Court of Appeals affirmed the finding of the Judicial Review Board that the justice had not violated the specified canon of the Judicial Code of Ethics. 171 W. Va. at 442.

En route to that decision, the *McGraw* court observed:

> "Even on the merits, we find a considerable body of law which holds that a judge will not be disqualified to sit on a case merely by expressing his opinion on a question of law involved in a case in his court or which may later come before him. *E.g.,* Justice [William H.] Rehnquist's Memorandum on Motion to Recuse, *Laird v. Tatum,* 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972); *United States v. Bray,* 546 F.2d 851 (10th Cir. 1976); *Antonello v. Wunsch,* 500 F.2d 1260 (10th Cir. 1974); *Kreling v. Superior Court in and for Los Angeles County,* 63 Cal. App. 2d 353, 146 P.2d 935 (1944); *People v. Church,* 192 Colo. 488, 560 P.2d 469 (1977); *In re Grblny's Estate,* 147 Neb. 117, 22 N.W.2d 488 (1946); *Davidson v. Shilling,* 187 Okl. 319, 103 P.2d 84 (1940); *Slayton v. Commonwealth,* 185 Va. 371, 38 S.E.2d 485 (1946); 48A C.J.S. *Judges* §§ 117-118 (1981); 46 Am. Jur. 2d *Judges* § 169 (1969)." 171 W. Va. at 443.

Based upon these and other cases, the *McGraw* court expressed its general conclusion of law that "[t]he public expression of a judge as to a legal issue does not automatically require his later disqualification when the issue is presented to him in a specific case." 171 W. Va. 441, Syl. ¶ 2. And the court specifically concluded that under the facts of the case, the justice's "statements made in advance of the mandamus action regarding the constitutional independence of the judicial budget, cannot be deemed sufficient to warrant his disqualification because of a claimed lack of impartiality." 171 W. Va. at 444.

In language reminiscent of our court's statements in *Harris v. Shanahan*, and our other decisions, the West Virginia court in *Blankenship* essentially described the fundamental difference between its duty to review legislation for constitutionality and a justice's disagreement with the legislature:

> "The administration of justice requires a clear definition and a just and prompt resolution of issues in litigation. As above noted, the basic issue for decision herein is whether the Legislature decreased five line items in the Judiciary's 1978-1979 budget in violation of the West Virginia Constitution. Despite the statements attributed to Justice McGraw in respondent's motion and affidavit, including newspaper exhibits reporting criticism of legislative leadership and action, *decision of the basic constitutional issue now before the Court clearly depends on the language and meaning of the Constitution and whether the action of the Legislature is in violation thereof. The controlling issue, thus defined and refined, can readily be decided on bases of well-established principles of constitutional law.* Contamination of the balances through personal feelings, bias, prejudice or partiality is foreign to the decisional process in such cases. The charges asserted as bases for disqualification of Justice McGraw are, in the context of this case, inappropriate, extraneous and not well-taken." (Emphasis added.) 161 W. Va. at 643-44.

See also *In re City of Milwaukee*, 788 F.3d 717, 723 (7th Cir. 2015) (a judge "[r]ecognizing that there may be a 'systemic problem' [giving rise to strip-search lawsuits against the City over which he is presiding] is not necessarily the same as saying that Milwaukee has a custom or policy that is unlawful," a central issue in the case; judge's statements did not raise reasonable concern over impartiality calling for his recusal). *Cf. In re P.L. 2001, Chapter 362*, 186 N.J. at 390 (despite judicial policy pronouncement that arming probation officers could not be reconciled with their role in court system, legislature nevertheless enacted law authorizing them to carry firearms; court found law unconstitutional).

In William H. Rehnquist's Memorandum on Motion to Recuse, *Laird v. Tatum,* 409 U.S. 824, 93 S. Ct. 7, 34 L. 2d. 2d 50 (1972), cited by the *McGraw* court, Justice Rehnquist faced a "public statement" disqualification motion filed by the respondents. 409 U.S. at 838. He was asked to disqualify himself not only because of expert testimony he gave before a congressional committee 17 months earlier while with the Department of Justice but also because speeches he had made related to the general subject in the case now before him. He freely acknowledged that during his committee testimony, "and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, *which was contrary to the contentions of respondents in this case*." (Emphasis added.) *Laird*, 409 U.S. at 826.

Nevertheless, Justice Rehnquist concluded that "none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending the bench." *Laird*, 409 U.S. at 831. Among other examples, he observed that while Justice Felix Frankfurter was a law professor, he had not only publicly expressed his views that the federal courts' "labor injunction should be neutralized as a legal weapon against unions," but he also played an important part in drafting federal labor law designed to correct that injunctive abuse in disputes. 409 U.S. at 831-32. Justice Frankfurter not only sat on one of the leading cases interpreting the Act's scope, he also wrote the Court's opinion. 409 U.S. at 832.

Justice Rehnquist also observed that "Justice Jackson in *McGrath v. Kristensen*, 340 U.S. 162[, 176, 71 S. Ct. 224, 95 L. Ed. 173] (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it). 340 U.S., at 176." 409 U.S. at 832. He also noted that Justice Jackson "reversed his earlier opinion after sitting in *Kristensen*." 409 U.S. 834

n.4; see 340 U.S. at 176 (Jackson, J., concurring; "I concur in the judgment and opinion of the Court . . . [that] is contrary to an opinion, which, as Attorney General, I rendered in 1940."). Based upon this history, Justice Rehnquist refused to recuse in *Laird*. *Cf. Barber County v. Lake State Bank*, 123 Kan. 10, 15, 254 P.401 (1927) (justice not disqualified in case filed after his election to Supreme Court involving same issues of law and fact as another suit he defended while Attorney General).

We concluded that the three public statements attributed to the chief justice did not prejudge the statute's constitutionality. And based upon *Laird* and these additional authorities, we also conclude the statements are not otherwise grounds for his recusal, *i.e.*, they did not create an appearance of impropriety such as "seeming" to prejudge. Rather, they simply reflected an opinion relevant to a nonobligatory, but nonetheless authorized, disagreement with the legislature on public policy on behalf of the judicial branch. See *Harris v. Shanahan,* 192 Kan. at 206. Accordingly, they are not cause for recusal of the other justices—who had no involvement in the statements' preparation—merely because of their status as the chief justice's colleagues.

To summarize in the language of our canons and caselaw, these statements do not contain "pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." KCJC Canon 2, Rule 2.10(B) (2015 Kan. Ct. R. Annot. 761). Nor do they "commit the judge(s) to reach a particular result or rule in a particular way in the proceeding or controversy." Rule 2.11(A)(4) (2015 Kan. Ct. R. Annot. 762). Nor do they create reasonable doubt concerning judicial impartiality in the mind of a reasonable person with knowledge of *all* the circumstances. *State v. Logan,* 236 Kan. 79, 86, 689 P.2d 778 (1984).

We also conclude these public statements would not create in the minds of reasonable persons with knowledge of all the circumstances a perception that the chief

justice—or by association, any justice—would violate the Kansas canons of judicial ethics or engage in other conduct that would reflect adversely on his or her honesty, impartiality, temperament, or fitness to serve as a judge by continuing to sit on this appeal. See Rule 1.2, Comment [5] (2015 Kan. Ct. R. Annot. 754).

We now turn to the Supreme Court's media statement of April 18, 2014.

5. *Partiality by the court's public statement*

This public statement—also authored and disseminated by the chief justice—stated in relevant part:

> "The Supreme Court of Kansas has strongly opposed this bill [HB 2338] since its creation. We are troubled now that it has been signed by the governor.
>
> "It weakens the centralized authority of the Kansas unified court system *in exchange for money to pay our employees and keep courts open. And the money it provides still may fall short of even doing that.*
>
> "This is a poor trade. We have very serious concerns about what will happen to the administration of justice in Kansas.
>
> "We believe Kansas deserves better." (Emphasis added.)

The statement does not mention the constitutionality of HB 2338—the issue now on appeal. Among other things, however, it mentions judicial branch funding that is of concern to the justices, particularly the chief justice. See K.S.A. 20-158 ("The chief justice of the supreme court shall be responsible for the preparation of the budget for the judicial branch of state government"). *Cf. State ex rel. Stephan v. O'Keefe,* 235 Kan. 1022, 686 P.2d 171 (1984) (judiciary concerned with matters affecting administration of

justice). Applying the same legal authorities and rationale expressed above concerning the three public statements attributable to the chief justice, we conclude the media statement by the court is directed at the public policy implications of the legislation, not at its constitutionality. See *Harris v. Shanahan*, 192 Kan. at 206-07.

And like those public statements attributable to the chief justice, the court's statement does not contain "pledges, promises, or commitments that are inconsistent with the *impartial* performance of the adjudicative duties of judicial office," which would be prohibited by Canon 2, Rule 2.10(B) (2015 Kan. Ct. R. Annot. 761). It also does not "commit[] the judge[s] to reach a particular result or rule in a particular way in the proceeding or controversy." Canon 2, Rule 2.11(A)(4) (2015 Kan. Ct. R. Annot. 762). Nor can any such conclusions be inferred from it. The statement would not create reasonable doubt concerning judicial impartiality in the mind of a reasonable person with knowledge of *all* the circumstances. It expresses only an opinion relevant to the court's nonobligatory, but nonetheless authorized, disagreement with the legislature on public policy. It is not an exercise of any justice's obligatory, limited review for statutory constitutionality, *e.g.*, prejudging. *Cf. In re P.L. 2001, Chapter 362*, 186 N.J. at 368.

Finally, the court's media statement would not create in the minds of reasonable persons with knowledge of *all* the circumstances a perception that any of the justices would violate the Kansas canons of judicial ethics or engage in other conduct that reflects adversely on his or her honesty, impartiality, temperament, or fitness to serve as a judge by continuing to sit on this appeal.

6. *Partiality because of relationship with Chief Judge Solomon*

The State also argues that due to Judge Solomon's "unique and close relationship with the Kansas Supreme Court" based upon his affidavit and longtime position as chief

judge, "the situation is precisely like a professional athlete claiming a special and close relationship with the game's referee." (Mot. p. 7.) It essentially alleges we have "a personal bias . . . concerning a party" and must recuse to avoid any appearance of impropriety. See Canon 2, Rule 2.11(A)(1). (Mot. p. 14.)

The State further argues the justices might "feel a debt of gratitude" to Judge Solomon because of his "extraordinary efforts" in bringing this suit, a debt whose payment infringes on the State's due process rights. In support of its argument, it cites *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (recusal required under Due Process Clause when judge is actually biased or there is a constitutionally intolerable probability of actual bias). (Mot. p. 15.) Accordingly, the State alleges its rights to due process may be violated by our continuing to sit.

In response to this argument alleging bias, gratitude, and appearance of impropriety, we note that in *Matter of Mason,* 916 F.2d 384, 387 (7th Cir. 1990), the court observed that while serving on the United States Supreme Court, "Chief Justice Burger wrote an opinion that led to the resignation of the President who gave him that office" and "Justice Holmes wrote a dissent in an antitrust case that President Roosevelt had personally decided to pursue, despite being a frequent guest at the Roosevelts' table."

Consistent with this federal court history, we also note that this court has not previously allowed Chief Judge Solomon's relationship with the court or the justices to create or maintain any bias in his favor in an appeal. For example, during his tenure as chief judge we reversed his decision and remanded for new trial in a case involving a defendant's convictions for eight counts of aggravated indecent solicitation of a child and eight counts of aggravated criminal sodomy against defendant's 9-year-old daughter and 10-year-old stepdaughter. *State v. Voyles*, 284 Kan. 239, 160 P.3d 794 (2007).

Finally, should the State still suggest this court is "more partial" toward Judge Solomon than members of the Court of Appeals would be, we note that during Judge Solomon's tenure as chief judge he has sat as a temporarily appointed colleague of Court of Appeals judges to help decide that court's cases. Moreover, he has written judicial opinions for that court on behalf of his temporary colleagues. See, *e.g.*, *Spencer v. State*, 24 Kan. App. 2d 125, 942 P.2d 646 (1997); *Matter of Estate of Campbell*, 19 Kan. App. 2d 795, 876 P.2d 212 (1994).

CONCLUSION

For all of the reasons set forth above, we conclude that, in the circumstances of this case, no justice is compelled by the Kansas Code of Judicial Conduct or other law to recuse.

BILES, J., concurring in result.

NUSS, C.J., concurring and supplementing: The court has ruled that no justice is compelled to recuse under our judicial canons or other law. Based on the four documents relied upon by the State, the decision on whether to recuse is not an easy one for me. Moreover, the State does not recite an additional fact regarding my involvement in public statements related to legislation that eventually became HB 2338. I also wrote testimony on March 14, 2014, and provided it to the House Appropriations Committee after the Senate passed the legislation and before it reached the House floor.

Like my February 17, 2014, written testimony to the Senate Judiciary Committee, the March 14 testimony also discussed SB 364. That bill—allowing chief judges to prepare, submit, and administer a budget for their own judicial districts—later became

part of HB 2338. While my March testimony used language similar to my earlier testimony, its next-to-last paragraph read a little differently, stating in relevant part:

> "So if this 37-year-old unified court system is to possibly be *so substantially* changed, why not let the people of Kansas change their mandate through a majority of a statewide vote on a constitutional amendment? Or at a minimum, why not perform a thorough study of this proposed change—as was done in the late 1960's and again in the early 70's?" (Emphasis added.)

Because I (1) wrote this testimony provided to the House Appropriations Committee; (2) authored testimony provided to the Senate Judiciary Committee; (3) wrote an op-ed piece published in a number of newspapers; (4) wrote the media release after HB 2338 became law; and (5) approved my general counsel's proposed testimony before he presented it to the Senate Judiciary Committee, I clearly engaged in more direct and indirect public communication on the legislation at issue than any of my colleagues.

The level of my involvement in this process is not surprising, given my particular position under Kansas Constitution, article 3, section 2, and the legislature's acknowledgement of the authority of that constitutional position. See, *e.g.*, K.S.A. 20-101 ("The *chief justice* shall be the spokesman for the supreme court and shall exercise the court's general administrative authority over all courts of this state.") (Emphasis added.); K.S.A. 20-158 ("The *chief justice* of the supreme court shall be responsible for the preparation of the budget for the judicial branch of state government.") (Emphasis added.); K.S.A. 2014 Supp. 20-318(b) ("The judicial administrator . . . shall implement the policies of the [supreme] court with respect to the operation and administration of the courts … *under the supervision of the chief justice*.") (Emphasis added.). The courts referenced in these statutes have more than 1,500 employees, more than 250 judges, an annual budget of more than $130 million, and serve nearly 3 million Kansans.

I recognize the duty to hear their cases. See *Bryce v. Episcopal Church in Diocese of Colorado*, 289 F.3d 648, 659 (10th Cir. 2002). But I am also cognizant of the unique facts and circumstances present in this one. See *Nichols v. Alley,* 71 F.3d 347, 352 (10th Cir. 1995) (determination in a recusal case is "extremely fact driven"); *U.S. v. Jordan,* 49 F.3d 152, 157 (5th Cir. 1995) (each recusal case is "extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances").

And when the written testimony to the House Appropriations Committee is considered with the rest of my personal involvement addressed in the court's order, while I am not required to recuse in this case, I choose to do so voluntarily. See *People v. Moreno*, 70 N.Y.2d 403, 406, 516 N.E.2d 200, 521 N.Y.S.2d 663 (Ct. Appeals N.Y. 1987) ("better practice" may counsel recusal in "special effort to *maintain* the appearance of impartiality" (Emphasis added.); *Rubio v. Turner Unified School District No. 202*, No. Civ. A. 05-2522-CM, 2006 WL 1044471 (D. Kan. 2006) (decision to recuse based on several factors mentioned in court's order as well as other factors not mentioned in defendant's motion).

LUCKERT, BEIER, ROSEN, and JOHNSON, JJ., concurring and supplementing: Our service as justices of the Kansas Supreme Court comes with the obligation to hear and decide all matters assigned to us. That obligation remains unless we must disqualify ourselves pursuant to the Kansas Code of Judicial Conduct or in observation of other controlling law. See, *e.g.*, Supreme Court Rule 601B, Canon 2, Rule 2.7 (2015 Kan. Ct. R. Annot. 758); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (due process). We recognize that we are disqualified from a particular case if a reasonable person with full knowledge of all of the circumstances would question our impartiality. Canon 2, Rule 2.11 (2015 Kan. Ct. R. Annot. 761).

We rely on the discussion in the Order above to dispose of the State's allegation that we are compelled to recuse in this case on the basis of a conflict. We write separately only to address certain matters related to the State's other allegation that we are compelled to recuse because of the public statements made by or attributable to the chief justice or the court.

We address the chief justice's direct and indirect statements first. He has stated above that he was the originator of the three statements identified by the State, as well as an additional letter to the House Appropriations Committee. We have searched our records and memories and can confirm that none of the four of us participated in the production or dissemination of any of these statements.

As for the April 18, 2014, press release, we acknowledge that it was produced and disseminated on behalf of the court, not the chief justice alone. Although none of the four of us participated personally in its production or dissemination, we appreciate that these facts would not insulate us from the call for our recusal if it qualified as public comment on the merit of the constitutional issue before us. It does not. Even a casual reader of the press release would understand that it does not speak to constitutionality at all. The State's contrary position is meritless.

Finally, two points discussed elsewhere and universal to all members of the court bear parting emphasis.

First, we have no personal doubts as to our impartiality in this case. We continue to have open minds regarding the constitutionality of HB 2338. In addition, we fully appreciate both our general rule that we presume the constitutionality of its Section 11 and our obligation to carefully examine the parties' arguments without prejudgment. We also know that we have not pledged, promised, or committed to an outcome in this

lawsuit, either personally or by attribution. See Canon 2, Rule 2.10(B) (2015 Kan. Ct. R. Annot. 761) ("A judge shall not . . . make pledges, promises, or commitments that are inconsistent with the *impartial* performance of adjudicative duties of judicial office."). Consequently, we believe we can fairly and impartially hear this case without violating the Kansas Code of Judicial Conduct or the State's right to due process. See Supreme Court Rule 601B, Terminology (2015 Kan. Ct. R. Annot. 748) (defining "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge").

Second, we understand that the reasonable person standard courts use to determine questions of recusal means that our own subjective evaluation of our impartiality is not the final word. Neither is the opinion of the parties to these proceedings. Rather, the caselaw requires courts to determine "whether a reasonable person—*if fully informed of the facts and circumstances underlying the grounds on which disqualification was sought, as well as the 'facts of life' that surround the judiciary*—would harbor significant doubts about the judge's impartiality." Flamm, Judicial Disqualification: Recusal and Disqualification of Judges, § 5.8, p. 134 (2d ed. 2007) (emphasis added); see *State v. Alderson*, 260 Kan. 445, 454, 922 P.2d 435 (1996) ("A judge should disqualify himself or herself if the circumstances and facts of the case 'create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself, or even, necessarily, in the mind of the litigant filing the motion, but rather in the mind of a reasonable person *with knowledge of all the circumstances*.'").

Among other things, the fact that this well established standard incorporates the necessity of complete knowledge means that the reasonable person standard bearer must understand: (1) our obligation to decide all cases, if not disqualified; (2) our duties as administrators of our court system, including the duty to participate in discussions of

public policy affecting the survival and function of the judicial branch; (3) the facts the chief justice has explained above about public statements regarding HB 2338; (4) HB 2338's effect, positive or negative, on every Kansas judge's power to select chief judges; and (5) the fact that the issue in this appeal is the constitutionality of Section 11 of the statute, not its wisdom. Most important, the hypothetical fully informed reasonable person must understand the reality that, like all judges, we routinely leave personal views—even those about the policy implications of legislative enactment, even when they are formed in the course of discharging our administrative duties—outside the courtroom. Then we impartially decide cases based solely on the law and the facts. See *Southern Pacific Communications Co. v. A.T.&T.*, 740 F.2d 980, 990 (D.C. Cir. 1984) ("It is well established that the mere fact that a judge holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case."); see also Flamm, Judicial Recusal, §§ 5.8, 6.10, 10.1, 10.7. In short, this is our job. We do it all the time. Not only are we used to it; we understand—and are confident Kansas citizens understand—that all have a right to expect us to fulfill our duty. "Litigants are entitled to an unbiased judge; not to a judge of their choosing." *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988).

Because a fully informed reasonable person must grasp the nature of our public service and must see that we have not expressed any view on the actual issue in this case, *i.e.*, the constitutionality of Section 11 of HB 2338, and because this reasonable person must also grasp that, at its core, this case presents a legal question no different from the myriad of legal questions Kansas judges are obligated to decide each day, this reasonable person would not question our impartiality. And no provision of the Kansas Code of Judicial Conduct and no other law persuades us to choose to recuse in this case.

STEGALL, J., concurring in part: I concur with this Order's conclusion that I am not required to recuse from this case, though I reach that conclusion for reasons different

from those stated in the Order. I write separately to explain those reasons and to make very clear a critical fact the State glosses over and ultimately ignores. Specifically, I have never made any public comment expressing any opinion—legal or otherwise—about the law in question. Each instance of public comment alleged by the State to create either an actual bias or the appearance of bias occurred before I was sworn in as a member of this court.

This contention of bias underlies all the arguments put forth by the State justifying its Motion for Recusal of *all* Supreme Court justices. For example, even when arguing the question of which judges might have a personal stake in the litigation, the State falls back to its claim of bias—*i.e.*, that prior public statements by the court or individual justices of the court require recusal. See, *e.g.*, State's Reply, at 6 ("[U]nlike the Chief Justice and the Supreme Court, the Court of Appeals judges have not made public statements about HB 2338, and certainly not public statements opposing and criticizing the law."). No doubt the State was aware that the gravamen of its Motion was simply inapplicable to one of the justices whose recusal was sought (there are oblique references to this fact in the State's pleadings). Yet the State chose to ignore this and instead repeatedly points to prior public statements critical of HB 2338 as justification for the State's demand that *all* of the justices of this court step aside.

I agree with this Order's conclusion that even though this case involves the proper constitutional scope of the powers of different departments of government—the judicial department vis-à-vis the legislative department—it does not follow that *any* judge has a personal stake or interest in its outcome. There is a vast difference between the very real *public* interest in constitutional governance which is at stake in all constitutional controversies and is shared equally by all citizens—including judges—and the kind of wholly private or personal interest in the outcome of a case (for example, direct financial interests, an intimate relationship with a party, etc.) which can require recusal.

Because the "institutional power" argument is the State's only plausible reason for recusal applicable to me, and because that argument fails as a matter of law, my recusal is not warranted and I will fulfill my "duty to sit where not disqualified." William H. Rehnquist's Memorandum on Motion to Recuse, *Laird v. Tatum*, 409 U.S. 824, 837, 93 S. Ct. 7, 34 L. Ed. 2d 50 (1972). Though I concur generally with the Order's discussion of the rule of necessity, an invocation of that rule is not needed to resolve the recusal request in this particular case.

Finally, the State's primary argument for recusal—*viz.*, real or perceived bias demonstrated by prior public statements—is simply inapplicable to me. For this reason, I am neither in a position to express an opinion on that contention nor is such an opinion necessary for me to resolve the State's request for my recusal. Therefore, I expressly decline to offer any opinion on the question of real or perceived bias raised by the Motion and disposed of by today's Order.

DATED this 7th day of December 2015.