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CASE NUMBER: 114573

IN THE SUPREME COURT OF THE STATE OF KANSAS

LARRY T. SOLOMON, CHIEF JUDGE, 30TH JUDICIAL DISTRICT of the STATE OF KANSAS,	)	
Plaintiff,	)	**Case No. 15-114573-S**
v.	)	
THE STATE OF KANSAS,	)	
Defendant.	)	

REPLY IN SUPPORT OF MOTION FOR RECUSAL

Chief Judge Solomon's Response to the State's Motion for Recusal complains about the timing of the State's motion. The Kansas Code of Judicial Conduct does not require the filing of a motion in order to require or accomplish recusal. Canon 2, Rule 2.11, Comment 2 ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."). Determining the need for recusal is the independent duty of the Justices, and that duty existed prior to, and independently from, the filing of the State's motion that now highlights it.

The Response floats several arguments why the Plaintiff believes recusal of the Supreme Court Justices is not required. Each is unpersuasive.

First, the Response claims that under K.S.A. 60-2101, the Justices must hear this case because a state statute has been held unconstitutional. The State agrees that this matter must be heard by the Supreme Court, but that does not prevent recusal of the Justices. Other judges, appointed to serve temporarily on the Supreme Court as authorized by law, can hear the case

consistent with K.S.A. 60-2101, and the Court regularly has appointed judges to serve in that role in cases involving constitutional challenges to statutes, most recently in the school finance litigation (*Gannon v. Kansas*, oral argument November 6, 2015). Appointing temporary judges to serve instead of recused Justices does not somehow transform the Supreme Court into something other than the Supreme Court.

Second, the Response argues that the Supreme Court often decides questions involving its power, such as its own jurisdiction. That is beside the point. As the State described in detail in its motion, the Supreme Court certainly does not often (perhaps not ever) decide questions involving its power upon which the Justices (or some number thereof) have thrust themselves into the political debate by repeatedly testifying in opposition during the legislative process (including statements that strongly implied the statute should be defeated *because it is constitutionally suspect*), written for publication an opinion article plainly intended to bring public opprobrium to the statute at issue, and issued a post-enactment statement condemning the statute being challenged in the lawsuit before the Court. The Justices are not a neutral arbiter in this constitutional dispute.

Third, the Response argues that recusal is not required because the Justices did not make a "pledge, promise, or commitment" to declare HB 2338 unconstitutional. Chief Justice Nuss, however, aggressively opposed the law on multiple occasions, and a reasonable person might very well interpret his statements as a pledge, promise, or commitment to view the law unfavorably in the event of legal challenge. But even if his statements (and the statements of the Court in its press release) fall short of formal pledges, promises, or commitments, recusal is still required because these statements might cause a reasonable person to doubt the Justices' impartiality. *See* Kansas Code of Judicial Conduct, Canon 2, Rule 2.11, Comment 1 ("[A] judge

is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions in paragraphs (A)(1) through (5) [of the rule] apply.").

Chief Justice Nuss was not writing an opinion piece about law, the courts, or the justice system generally; he was criticizing a very particular proposed law, one which he candidly acknowledged could come before the Court in litigation and which is now the subject of this case. There is no escaping that the Chief Justice actively lobbied against HB 2338 in both the Legislature and the press and, after the law's passage, the Court issued a press release in an effort to invite public condemnation of the law. These actions would certainly cause a reasonable person to question the Justices' ability to impartially decide this appeal.

Fourth, the Response argues that Chief Justice Nuss's statements are not a basis for seeking recusal of the other Justices. This argument overlooks the fact that the press release regarding HB 2338 was issued in the name of the entire Supreme Court and is therefore attributable to every member of the Court at the time. Likewise, in his opinion column addressing HB 2338, Chief Justice Nuss stated the "*Supreme Court* strongly opposes" the law. *See* Exhibit C to the State's Recusal Motion (emphasis added).

Chief Justice Nuss's other statements regarding HB 2338 also reflect on the other Justices. As the Response acknowledges, Chief Justice Nuss is charged with "representing the judiciary in conversations with the public, and with the legislative and executive branch," Solomon Response at 12, and the Supreme Court's own operating procedures provide that "[t]he Chief Justice shall be the spokesperson for the Supreme Court . . . ." *See* Supreme Court Internal Operating Procedures, General Rules. Thus, a reasonable observer not only could, but would, infer that Chief Justice Nuss was speaking on behalf of the entire Court in opposing HB 2338; he certainly never indicated that his comments represented only his individual opinions. At a

minimum, the Chief Justice's statements might cause a reasonable person to doubt the impartiality of all the Justices, or at least of those Justices who were members of the Court at the time such public statements were being made on behalf of the Court. Indeed, there has been at least some public commentary to that effect since the State filed its Motion. *See* Martin Hawver, Hawver's Capitol Report, Vol. 23, No. 19 (Nov. 13, 2015) (reporting that this case "represents an obvious conflict of interest").

Fifth, the Response argues that the U.S. Supreme Court's due process decisions regarding recusal, including *Caperton v. Massey*, 556 U.S. 868 (2009), are "completely inapposite." That assertion ignores a century of U.S. Supreme Court precedent holding that "due process" under federal law requires a neutral and impartial decisionmaker. Due process requires recusal when the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822, 825 (1986) (ellipses in original) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). Of course the circumstances here (public statements opposing and criticizing a particular law) are different than those in *Caperton* (a party in that case had given the justice a large campaign contribution), but the principle is exactly the same: due process precludes judges from deciding a case when they cannot "hold the balance nice, clear and true." As explained in the State's motion, the Justices may "feel a debt of gratitude" to Chief Judge Solomon for challenging a law they so strongly opposed, plus they have an "official motive" to declare Section 11 of HB 2338 unconstitutional. *See* State's Recusal Motion at 14-17.

Sixth, the Response argues that Chief Judge Solomon's factual assertions about his "close" relationship with the Supreme Court do not require recusal of the Justices because those assertions are "irrelevant." Solomon Response at 13. It is true that the district court did not rely

on these assertions in granting summary judgment, but Chief Judge Solomon made the assertions in an affidavit in support of his motion for summary judgment, as well as in the motion itself, presumably and obviously because he believed they were relevant. It was Chief Judge Solomon, not the State, who injected these factual questions into this litigation, and his allegations are at least potentially an issue in this appeal.

Moreover, the Response attempts to dismiss the importance of this factual information because "[t]he only issue to which [it] could potentially be relevant is standing," Solomon Response at 13; however, the standing of Chief Judge Solomon to bring this lawsuit is one of the issues presented in this appeal. More importantly, though, even assuming the allegations are irrelevant to deciding the merits of the appeal, the fact that Chief Judge Solomon is claiming such a unique and close relationship with the Supreme Court Justices is reason enough to question the Justices' impartiality.

Finally, the Response argues that the rule of necessity prevents recusal because it is conceivable the Court of Appeals judges also might be affected by the outcome of the appeal. But the crux of the appeal is Section 11 of HB 2338, the provision that changes the way in which chief district judges are selected, a process in which the Court of Appeals plays no role under either the method this Court adopted by rule or the provisions of HB 2338. True, there is a provision of HB 2338 which changes the selection process for the chief judge of the Court of Appeals (section 22), but that provision is not the target of this suit and the appeal, nor could it be—Chief Judge Solomon, who is the only plaintiff in this case but is not a member of the Court of Appeals, most certainly lacks standing to raise it (the State maintains he also lacks standing for the claims he did raise) and has not attempted to do so.

Moreover, unlike 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. Thus, there is no reason to think that they cannot "hold the balance nice, clear and true" in assessing the constitutionality of Section 11 of HB 2338. Because the Court of Appeals judges are not conflicted from hearing this appeal, the rule of necessity does not apply.

In addition, the State's principal point regarding Court of Appeals judges was that by selecting the entire membership of the Court of Appeals to sit on the Supreme Court and hear this appeal, the recusal process would avoid any need for the Justices to make discretionary choices as to who should replace them. State's Recusal Motion at 20-21. Appointing the *entire* membership of the Court of Appeals to sit as the Supreme Court in this appeal—and only that approach—avoids the risk that the Justices may be perceived as handpicking their replacements.

At the end of the day, none of Chief Judge Solomon's arguments undermines the numerous bases for the State's request for recusal. Because the impartiality of the Justices might reasonably be questioned, the Justices should recuse themselves and appoint Court of Appeals judges to temporarily serve on the Supreme Court and decide this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of November 2015, a copy of the above motion was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were mailed, postage prepaid, to:

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