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.	)	

MOTION FOR RECUSAL

The State of Kansas hereby moves for the recusal of the Justices of the Kansas Supreme Court in this matter because public respect for this Court requires the Justices to "ensure[] the greatest possible public confidence in their independence [and] impartiality . . . ." See Rules Relating to Judicial Conduct, Kansas Supreme Court Rule 601B, Preamble (2) (hereafter referenced as "Kansas Code of Judicial Conduct" or "Code"). As Chief Justice John Roberts famously explained during his confirmation hearing, the proper role of a judge is "to call balls and strikes, and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing before the United States Senate Committee on the Judiciary, 109th Cong. 56 (September 12-15, 2005). Recusal is required in this case because the Justices of the Kansas Supreme Court (or some number of them) have been active and repeated participants on one side of the dispute they now are being asked to umpire.

The maxim that judges (or Justices) with a direct stake in the outcome of litigation, or who have expressed strong opinions about a potential case, should not sit on such a case is deeply rooted in the American justice system and applies here. "No man is allowed to be a judge

in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (*quoting* The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison)).

This is an "exceptional case" in which the circumstances demonstrate "that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Caperton*, 556 U.S. at 876-77, and that risk and its associated appearance certainly are impermissible under the more stringent standards this Court has imposed on itself through the Kansas Code of Judicial Conduct. At the core of this case is the validity of 2014 Senate Substitute for House Bill 2338 ("2014 House Bill 2338"), a measure about which this Court (or some number of Justices thereof) has repeatedly and publicly expressed to both the Legislature and the public its opposition in an unsuccessful attempt to prevent the bill's enactment and to secure public condemnation of the enacted measure after it became law. The State is unaware of any prior situation in which the Supreme Court (or some of its members) has made repeated extrajudicial statements in an effort to prevent the Legislature from enacting a statute (including statements stating or implying one reason for rejecting a bill is its suspect constitutionality) and then made a further extrajudicial statement after enactment complaining sharply about what the Legislature has approved. Taken together, public statements by the Court and the Chief Justice demonstrate the Court's strong, direct interest in the outcome of this case and create an unavoidable appearance the Court might not decide the case impartially. "Conduct that compromises or appears to compromise the . . . impartiality of a judge undermines public confidence in the judiciary." Kansas Code of Judicial Conduct, Canon 1, Rule 1.2, Comment 3.

This Court has recognized that recusal of a Justice may be required by either the Kansas Code of Judicial Conduct or constitutional principles of due process. *See State v. Sawyer*, 297 Kan. 902, 905 (2013).[1] Under the unusual circumstances here, the Code of Judicial Conduct requires recusal and, if reached, the constitutional due process analysis would compel the same result. Thus, the Justices of the Supreme Court should recuse themselves from this case (currently scheduled for oral argument on December 10, 2015), and the recusal should be accomplished in a manner that "ensures the greatest possible public confidence" in the Court's "independence [and] impartiality" in this case. Kansas Code of Judicial Conduct, Preamble (2).

To this end, this case should be heard by Court of Appeals judges appointed for temporary assignment to the Supreme Court, utilizing either (1) appointment of the entire Court of Appeals to hear the case *en banc*, as will be done in another important Kansas constitutional case the previous day (*Hodes & Nauser v. Schmidt*, No. 15-114153-A, set for oral argument on December 9, 2015), or (2) a random selection of seven Court of Appeals judges. As explained below, both options are permissible under Kansas law, and both options would be appropriate in the unusual circumstances presented here.

Given that the scheduled oral argument for this case is exactly one month away, the Court should address this motion expeditiously so the judges selected to hear this case will have adequate time to prepare or, if the recusal of Justices requires setting a new date for oral argument, so the parties may adjust their schedules accordingly.

I. This Case Presents Unusual, Indeed Unprecedented, Circumstances.

The heart of this case is the disputed constitutionality of 2014 House Bill 2338. The principal dispute concerns the Kansas Supreme Court's authority to appoint chief district court

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[1] *Sawyer* also recognizes a basis for recusal under K.S.A. 20-311d, but that statute is inapplicable to Justices of the Kansas Supreme Court.

judges when the Legislature has enacted a law providing for peer selection.[2] Under the Plaintiff's reading of dicta in *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1 (1983), a Supreme Court rule relating to judicial administration automatically trumps a conflicting statute, while the State maintains that the Legislature may enact statutes governing judicial administration so long as those statutes do not substantially interfere with the Supreme Court's general administrative authority under the separation of powers test articulated in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84, 179 P.3d 366 (2008). Thus, there is no escaping the fact that the scope and nature of this Court's institutional power is *the ultimate issue* in this case.

Against that backdrop of a dispute directly involving the Court's own power, this Court (or some number of Justices thereof) voluntarily thrust itself into the policy and political debates leading to the enactment of the legislation now in dispute in this case. Ever since the Legislature began considering the policies ultimately enacted in 2014 House Bill 2338, this Court repeatedly has acted as an advocate for defeat of the legislation, and it has done so in a public fashion that precludes any possible conclusion that the Justices can be impartial umpires in the dispute now before the Court.

First, Chief Justice Nuss and his staff publicly opposed the proposed legislation and actively engaged in the legislative process in an attempt to prevent its enactment. Steve Grieb, the Chief Justice's General Counsel, testified in opposition to 2014 Senate Bill 365, which contained the chief judge selection provisions that were ultimately incorporated into 2014 House Bill 2338 and are being challenged here. (Exhibit A). It would defy credulity to claim that Mr. Grieb offered this testimony in any way other than on behalf of at least the Chief Justice, if not

[2] The district court made clear, however, that by operation of the statute's nonseverability clause, *all* provisions of 2014 House Bill 2338 were invalidated when the chief-judge selection provision was held unconstitutional. District Court Opinion at 35.

the entire Court itself. Furthermore, Chief Justice Nuss himself submitted written testimony in opposition to 2014 Senate Bill 364, a bill to give chief district court judges the option of preparing and submitting a budget for their judicial districts (Exhibit B). 2014 Senate Bill 364 ultimately was included in 2014 House Bill 2338. If the district court's judgment is affirmed in this appeal, that provision—a provision very publicly opposed by Chief Justice Nuss—also will be invalidated because of the law's nonseverability clause.

Second, after the Kansas Senate passed the legislation, but before the House had voted, Chief Justice Nuss issued an opinion column published under his name in multiple Kansas media outlets. *See, e.g.*, Lawton R. Nuss, *Kansas Legislature Threatens Judges' Independence*, Kansas City Star, March 17, 2014, available at http://www.kansascity.com/opinion/readers-opinion/as-i-see-it/article342570/Kansas-Legislature-threatens-judges%E2%80%99-independence.html (Exhibit C). In that opinion piece, the Chief Justice pointedly discussed the pending legislation and explicitly stated that "[s]ome argue this Senate action violates the people's constitution." He then explained the Supreme Court's "general administrative authority" granted under the Kansas Constitution, and effectively, if not explicitly, suggested that the new law may violate that constitutional provision.

Third, the Court itself issued an unusual (perhaps unprecedented) press release harshly critical of the law at issue in this case. On April 18, 2014, after the Governor signed 2014 House Bill 2338 into law, the *Court* (not just Chief Justice Nuss) released the following statement:

> *The Supreme Court of Kansas* has strongly opposed this bill 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 Kansans deserve better.

Exhibit D (emphasis added), also available at http://www.kscourts.org/Kansas-courts/General-information/News-Releases-2014.asp. The release was issued by the entire "Supreme Court of Kansas," and there was no indication that any Justice dissented from or declined to join the statement. Thus, the statement and its condemnation of 2014 House Bill 2338 are attributable to *every* Justice who was a member of the Court at the time the statement was issued on April 18, 2014.

Fourth, and in a somewhat different vein, one of the factual issues in dispute in the district court was the nature of the relationship between Chief Judge Solomon and the Supreme Court. Chief Judge Solomon asserted that he enjoyed a unique and close working relationship with the Supreme Court that would be imperiled by changing the selection process for chief judges. *See* Plaintiff's Memorandum in Opposition to State's Motion to Dismiss and in Support of Plaintiff's Cross-Motion for Summary Judgment, at 3-4 (alleging that Chief Judge Solomon has a "long-standing professional relationship of trust and confidence" and a "close working relationship" with the Supreme Court); *id.* at 25 ("In serving as chief judge of the 30th Judicial District for almost a quarter of a century, Chief Judge Solomon has enjoyed a close working relationship with the Supreme Court based on trust and confidence"); *id.* at 26 (alleging that Chief Judge Solomon meets privately with the Supreme Court and the other chief judges at least twice a year and engages in candid and confidential conversations). The State argued that, absent discovery, it had no basis to contest this assertion, which relied solely on Chief Judge Solomon's own untested affidavit, but the District Court declined to permit the State any discovery regarding Chief Judge Solomon's allegations.

In any event, the *sole plaintiff* in this case is asserting that he has a unique and close relationship with the Kansas Supreme Court. Such a circumstance will hardly give the public confidence that the Justices can serve as impartial umpires in this appeal. Indeed, the situation is precisely like a professional athlete claiming a special and close relationship with the game's referee. No one would think such a situation fair in the sports world; why should it be fair in the much more consequential world of government and interpretation of the Kansas Constitution?

II. This Court's Own Code of Judicial Conduct Requires Recusal of the Justices of the Supreme Court in This Case.

The "black letter of the Canons and Rules is binding and enforceable." Kansas Code of Judicial Conduct, "Scope" (6). Recusal is the proper means of ensuring the "black letter of the Canons and Rules" remains "binding and enforceable" in the unusual circumstances of this case. *See Sawyer*, 297 Kan. at 906 (Code of Judicial Conduct provides basis for recusal); *see also* Kansas Code of Judicial Conduct, "Application" I(B) (Code applies to Supreme Court Justices). For the Justices who have participated in the unusual circumstances described above now to proceed to decide this appeal would violate the Code of Judicial Conduct in at least three distinct ways, or at a bare minimum would *appear* to a reasonable observer to violate the Code and such appearance alone is sufficient to require recusal.[3]

[3] Rule 1.2 requires that a judge . . . shall avoid . . . the appearance of impropriety." Canon 1, Rule 1.2. Under the Code, "impropriety" is defined to include "conduct that violates . . . provisions of this Code . . . ." "Terminology" section. The comment explains that "[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code . . . ." Rule 1.2, Comment 5. Thus, if the actions of the Supreme Court (or a number of Justices thereof) in connection with this matter have "create[d] in reasonable minds a perception" that a Justice would violate this Code by now sitting in this case, then an impermissible appearance of impropriety exists and recusal is required. Moreover, Comment 3 to Rule 1.2 provides: "Conduct that compromises *or appears to compromise* the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary." (Emphasis added.)

It is widely accepted that judicial impartiality in both fact and appearance is indispensable to the interests of justice and respect for the Judiciary, as Chief Judge Solomon's counsel in this case explicitly and strongly has recognized. *See, e.g.*, Fair Courts, Brennan Center for Justice, https://www.brennancenter.org/issues/fair-courts (last visited Nov. 9, 2015) ("Fair and impartial courts are the guarantor of equal justice in American constitutional democracy. The very legitimacy of the courts depends on the public belief that judges will treat every party without bias or favor . . . ."); Judicial Independence Resource Guide, National Center for State Courts, http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Independence/Resource-Guide.aspx (last visited Nov. 9, 2015) ("Justice depends upon the ability of judges to render impartial decisions based upon open-minded and unbiased consideration of the facts and the law in each case, as well as maintains public trust and confidence within the courts."); Constitutional Rights: Fair and Impartial Courts, American Bar Association, http://apps.americanbar.org/dch/committee.cfm?com=IR404000&edit=0 (last visited Nov. 9, 2015) ("If courts aren't impartial and independent, they can't perform their constitutional role as guardians of our liberties.").

A. Rule 2.11 requires recusal because an objective observer might reasonably question the impartiality of the Supreme Court Justices.

Canon 2, Rule 2.11 of the Kansas Code of Judicial Conduct requires that a "judge shall disqualify himself or herself in any proceeding in which the judge's impartiality *might* reasonably be questioned." (Emphasis added). The rule gives examples of circumstances in which recusal is required, including (most relevant here) when the judge "has more than a de minimis interest that could be substantially affected by the proceeding" and when the judge has "made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or

controversy." Rule 2.11(A)(2) and (4). These examples are nonexclusive: "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." Canon 2, Rule 2.11, Comment 1 (emphasis added).

The test is not whether a particular judge subjectively believes that he or she can be impartial; rather, the standard is whether a reasonable, objective observer *might* doubt the judge's impartiality. *See State v. Schaeffer*, 295 Kan. 872, 876, 286 P.3d 889 (2012) ("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.'"); *cf. State v. Hunt*, 147 Vt. 631, 633, 527 A.2d 223 (1987) ("Although there is no doubt in our own minds that we could fairly and impartially decide the legal issues in the instant appeal, that is not the test.").

The unusual, indeed unprecedented, circumstances of this case, as described above, reveal conflicts with several aspects of the Code of Judicial Conduct that might well create a reasonable doubt in the mind of any objective, reasonable observer regarding the Justices' ability to be impartial in this case. Such a conclusion requires recusal for several reasons, any one of which is sufficient here.

First, Rule 2.2 requires impartiality and fairness. The comments addressing the rule emphasize that "a judge must be objective and open-minded." Code, Rule 2.2, Comment 1. The Code defines "impartiality" as "maintenance of an open mind in considering *issues* that may come before a judge." Code, "Terminology" (emphasis added). But in this case, the Justices (or some number thereof) testified against enactment of the law that is the subject of this case, wrote

an opinion column criticizing the proposed law when it was under consideration, and issued a public statement upon the law's enactment declaring that they had "strongly opposed" it throughout its legislative consideration, were "troubled" that it had been approved, had "very serious concerns" about its effect on the administration of justice, and "believe Kansans deserve better." These statements would cause any reasonable person to doubt the ability of the Justices to be impartial in this case, and thus Rule 2.11 requires recusal.

Second, Rule 2.10 provides that a "judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court," and further requires that "[a] judge shall not, in connection with . . . issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." Rule 2.10(A) and (B). Throughout the legislative process, the Chief Justice and his staff raised questions about the constitutionality of provisions of 2014 House Bill 2338, making it likely and foreseeable that litigation would be "impending" if the legislation were enacted. At a minimum, the various statements by the Chief Justice and the Court critical of this legislation constituted commentary on a "controvers[y]" or "issue[] . . . likely to come before the court." No reasonable, objective observer could interpret the Court's unusual public statement indicating "the Supreme Court of Kansas" was "troubled" by and has "very serious concerns" about the statute, and the Court's foregone conclusion that the statute "weakens the centralized authority of the Kansas unified court system in exchange for money to pay our employees and keep courts open," as anything other than the entire Court's "pledge[], promise[], or commitment[]" to receive the statute unfavorably. In other words, no reasonable, objective observer could conclude anything

other than that the Court already has prejudged 2014 House Bill 2338, and believes the statute is unconstitutional.

The Chief Justice's opinion column presents similar issues under Rule 2.10. Although the Chief Justice ostensibly claimed, "I express no opinion on the constitutionality of the package because if it is challenged in a lawsuit the Supreme Court may need to answer that question," he did not stop there. Instead, he proceeded to say that Kansans should ask, "is this package true to the will of the people when they voted to change their constitution [to give the Supreme Court general administrative authority]?" He also asserted that "[t]he Supreme Court strongly opposes the package." There can be little doubt that a reasonable, objective reader of this opinion column would question the Chief Justice's ability to impartially consider the statute if it later came before the Supreme Court in the context of an appeal in a case challenging the statute's constitutionality. Under these circumstances, Rule 2.11 requires recusal.

Third, Rule 3.1(C) forbids a judge from "participat[ing] in [extrajudicial] activities that would appear to a reasonable person to undermine the judge's . . . impartiality." Code, Rule 3.1(C). The Code defines "impartiality" as "maintenance of an open mind in considering *issues* that may come before a judge." Code, "Terminology" (emphasis added). The scope of Rule 3.1 is broad and includes matters such as "speaking" and "writing." Code, Rule 3.1, Comment 1. A similar prohibition is contained in Canon 2, Rule 2.11(A)(4), which requires recusal when a judge "has made a public statement other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy." Taken together, these provisions of the Code prohibit a Justice from participating in a case where his/her extrajudicial speaking or writing would appear to a reasonable person to undermine the judge's ability to maintain an open mind in considering

issues that may come before the judge, particularly (but not only) if the extrajudicial commentary even might appear to commit the judge to reach a particular result in such a proceeding.

The press release the Supreme Court issued after the enactment and signing of 2014 House Bill 2338 is precisely such an extrajudicial statement. As discussed above, the Court's press release certainly gives the appearance to any reasonable, objective observer that the Court cannot be impartial with respect to legislation that it "strongly oppose[s]." The opinion column and legislative testimony by the Chief Justice present precisely the same problem.[4] Each of these extrajudicial writings is a political statement announcing the Court's opposition to the law at issue in this case and attempting to prevent or condemning its enactment.

Even if for some reason Rule 2.11(A)(4) did not apply on its own terms, Rules 3.1(C) and 2.11(A) still would operate to require recusal. An objective observer *might* reasonably question whether Justices who "strongly" oppose a law, Justices who harbor "very serious concerns" about its effect on the branch of government they lead, and Justices who are "troubled" by the law's enactment (for whatever reason(s)), can impartially decide whether the law is constitutional. The Court's April 2014 press release, which claims that 2014 House Bill 2338 "weakens the centralized authority of the Kansas unified court system," was an explicit condemnation that demonstrates the Court's opposition to 2014 House Bill 2338, and was directed in large part at the bill's chief judge selection provisions, the very provisions that are now the focus of this litigation.

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[4] Regarding the legislative testimony at issue, Code, Canon 3, Rule 3.2 specifically contemplates that a judge may testify before the legislature "in connection with matters concerning the law, the legal system, or the administration of justice," and the testimony of the Chief Justice and Mr. Grieb (presumably on behalf of the Court) undoubtedly meet that threshold test. However, Rule 3.2 also makes explicit that any testimony delivered under its authority is subject to the limitations of Rules 2.10 and 3.1(C). *See* Rule 3.2, Comment 2.

Even if the Court's opposition to 2014 House Bill 2338 was directed to other aspects of the bill, that does not change the necessity of recusal in this appeal because striking down *any* provision the law—including the chief judge selection provision—will invalidate the entire bill as a result of the nonseverability clause in the bill (precisely as the district court ruled below). Thus, an objective observer *might* reasonably question this Court's impartiality no matter which provisions of 2014 House Bill 2338 "the Court" as a whole condemned in its public statements. Under these circumstances, Rule 2.11 requires recusal.

B. Rule 1.2 requires recusal because confidence in the judiciary would not be promoted if the Justices decide this case given the appearance they lack impartiality.

Canon 1, Rule 1.2 provides "[a] judge shall act at all times in a manner that promotes public confidence in the *independence*, *integrity*, and *impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of impropriety." (Emphasis in original.) Comment 3 to this Rule states that "[c]onduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary . . . ." The pre-decisional extrajudicial commentary by the Chief Justice and the entire Court, precisely and expressly about the particulars of the very law being challenged in this appeal, is troublesome and would cause any reasonable, objective observer to question the fairness and impartiality of having the current members of the Court hear and decide the appeal the Court itself now has scheduled for oral argument on December 10, 2015.

C. Rule 2.11(A)(1) requires recusal in this case because the Justices have personal knowledge of facts relevant to the dispute and, as alleged by the sole plaintiff in this case, a unique and close relationship with that plaintiff.

Canon 2, Rule 2.11(A)(1), of the Kansas Code of Judicial Conduct provides that a judge shall disqualify himself or herself when the "judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding."

Here, Chief Judge Solomon has alleged that he has a particularly close working relationship with the Supreme Court based on trust and confidence. Thus, the sole plaintiff in this case is effectively and expressly alleging "favorite" or "insider" status with the members of the Court.

Because the Justices of the Supreme Court have personal knowledge about their relationship with Chief Judge Solomon, one of the factual aspects of this case according to the sole plaintiff, Chief Judge Solomon, recusal is required under Rule 2.11(A)(1). Recusal is particularly appropriate given that the State has been permitted no discovery (relating to this issue or otherwise) regarding Chief Judge Solomon's allegations.

The facts alleged by Chief Judge Solomon require the Justices' recusal. According to Chief Judge Solomon, he has a close relationship with the members of the Supreme Court, a relationship built on "trust and confidence." Chief Judge Solomon has averred that he meets privately with the Justices and other chief judges at least twice a year to engage in candid and confidential conversations, he has had special meetings with the Justices over the last few years, and he occasionally receives requests from his department justice or the Chief Justice seeking information or his opinion on certain issues. *See* Affidavit of Larry T. Solomon, attached to Plaintiff's Memorandum in Opposition to State's Motion to Dismiss and in Support of Plaintiff's Cross-Motion for Summary Judgment, at ¶¶ 3-6. Based on Chief Judge Solomon's allegations that he has such a close relationship with the Justices, any reasonable, objective observer might well perceive that the Justices necessarily will be biased in favor of Chief Judge Solomon. The Justices should recuse themselves to avoid any appearance of impropriety.

III. Federal Due Process Principles Counsel in Favor of Recusal.

The United States Supreme Court long has recognized that the Due Process Clause of the Fourteenth Amendment imposes constitutional restraints on state judges and requires their

impartiality. In *Caperton*, the Court found due process to compel recusal of a West Virginia Supreme Court Justice who sat in a case involving a major campaign supporter. In doing so, the Court held that Due Process requires the following inquiry: "[W]hether, under a realistic appraisal of psychological tendencies and human weakness, the [judge's] interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. 883 (internal quotation marks and citation omitted); *see also State v. Hurd*, 298 Kan. 555, 570, 316 P.3d 696 (2013) ("Recusal is required under the Fourteenth Amendment's Due Process Clause when the judge is actually biased or there is a constitutionally intolerable probability of actual bias."). The reasoning of *Caperton* is applicable and persuasive here in at least two regards.

First, *Caperton* acknowledged that if a Justice were to "feel a debt of gratitude" for "extraordinary efforts" that benefit the Justice, then due process concerns may arise. 556 U.S. at 882. A reasonable, objective observer might conclude that the Justices of the Kansas Supreme Court "feel a debt of gratitude" to the plaintiff in this case (Chief Judge Solomon) for his "extraordinary efforts" in stepping forward to challenge 2014 House Bill 2338, a measure "the Supreme Court of Kansas has strongly opposed . . . since its creation," in public opposition to the Governor (who signed the bill into law) and a majority of the Legislature (which passed the law). Chief Judge Solomon's challenge has the potential to vindicate the Justices' own repeatedly expressed public opposition to 2014 House Bill 2338, especially given that this lawsuit may present the final opportunity to prevent implementation of the law, an enactment that the Kansas Supreme Court has vigorously opposed from its inception.

Second, *Caperton* also interpreted the Due Process Clause to prohibit judges who may have "official motive" to prefer a particular outcome in a case, a motive which might "tempt

adjudicators to disregard neutrality," from participating in such a case. 556 U.S. at 878. The Court explained that a mayor who also sits as a municipal judge may violate due process if the city he leads as mayor—not the mayor personally—benefits directly from decisions he makes as a judge. *Id*. Even if a Justice is not *in fact* biased or improperly influenced, due process may be offended if "sitting on the case then before the Supreme Court . . . would offer a *possible* temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id.* at 879 (internal punctuation and citations omitted) (emphasis added).

Here, the Kansas Supreme Court's institutional interest in preventing implementation of 2014 House Bill 2338—strongly and repeatedly expressed by the Court itself (or some number of Justices thereof) throughout the legislative process that led to the bill's enactment and afterwards—provides ample "official motive" for a reasonable, objective observer to believe the Justices may be "tempt[ed] . . . to disregard neutrality" in this case. *Id.* at 878. Moreover, there could have been virtually no doubt in the minds of the Kansas Supreme Court Justices that 2014 House Bill 2338 could lead to litigation challenging the law's constitutionality. As was the case with the campaign contributions at issue in *Caperton*, here it was "reasonably foreseeable," *id.* at 886, if not virtually certain, at the time the Kansas Supreme Court chose to engage in repeated acts of advocating defeat or condemnation of 2014 House Bill 2338 throughout the legislative process that the measure, if enacted, would result in constitutional litigation, litigation that ultimately and necessarily would arrive eventually in the Kansas Supreme Court. Indeed, the Chief Justice testified to the Legislature that 2014 Senate Bill 364 (giving chief district judges control over their district's budgets) "appears to reject the 'mandate from the people of Kansas' to modernize the Kansas judicial system per amended Article 3 of the Kansas Constitution." Exhibit B. In the same vein, the Chief Justice's own General Counsel testified that 2014 Senate

Bill 365 (the chief judge selection provision) "appears to conflict with the provisions of Article 3, Section 1, of the Kansas Constitution." Exhibit A. To any reasonable, objective observer these extrajudicial statements would appear to be a virtual *invitation*, issued by or on behalf of the state's highest court, to challenge the constitutionality of the legislation if it were enacted.

Under federal due process analysis, "objective standards may also require recusal whether or not actual bias exists or can be proved." *Caperton*, 556 U.S. at 886. In this unique and unprecedented situation, there is a serious risk that the Justices cannot be impartial, and in any event will not appear to reasonable observers to be impartial, in deciding this appeal. Moreover, given such a significant risk, having the Justices participate in this appeal would seriously undermine public confidence in the impartiality of the Kansas Supreme Court.

IV. The Rule of Necessity Does Not Prevent Recusal

In relatively recent comments to the media about the challenged law *and this pending case*, Chief Justice Nuss is reported to have suggested that, even though the Supreme Court's power is at issue, recusal may not be required because of the "rule of necessity." *See* John Hanna, Associated Press, *Kansas Supreme Court May Review Case Dealing With Its Own Power* (Sept. 3, 2015), available at http://cjonline.com/news/2015-09-03/kansas-supreme-court-may-review-case-dealing-its-power. With all due respect, the comments attributed to the Chief Justice are erroneous as a matter of clearly established law.

The rule of necessity provides that a judge who otherwise would be recused may hear a case when that judge's participation is necessary for a decision. *See, e.g.*, *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, 656-57, 143 P.2d 652 (1943); *see also United States v. Will*, 449 U.S. 200, 213-15 (1980). But the rule *only* applies when there is *no mechanism for replacing* recused judges. *Sage Stores*, 157 Kan. at 657 ("If the law provides for a substitution of personnel

on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act." (quoting *Brinkley v. Hassig*, 83 F.2d 351, 357 (10th Cir. 1936))); *id.* ("The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—*where no provision is made for calling another in, or where no one else can take his place*— it is his duty to hear and decide, however disagreeable it may be." (Emphasis added) (quoting *City of Philadelphia v. Fox*, 64 Pa. 169, 185 (1870))).

The discussion of the rule of necessity in the Code of Judicial Conduct confirms the general proposition that the rule is inapplicable when alternative forums or decision-makers are available.[5] This Court's own decisions are also fully consistent with that general and widely accepted proposition. For example, in *Aetna Ins. Co. v. Travis*, 124 Kan. 350, 259 P. 1068 (1927), this Court held the rule of necessity applied since, in 1927, there was "no method provided by our Constitution or statute for having another person sit as judge of this court." *Id.* at 1070. Since 1927, however, Kansas law has been amended to provide a procedure for replacing recused Justices, a procedure regularly and repeatedly utilized by the Court. *See* K.S.A. 20-3002(c); Kan. Const. art. III, § 6(f). As a result, the participation of Justices whose impartiality might reasonably be questioned is not necessary to decide this matter, and the rule of necessity does not prevent recusal, nor does it remotely justify having the Justices participate in this appeal. *Cf. In re Kline*, 298 Kan. 96, 97 (2013) ("In an order effective May 18, 2012, five members of the Kansas Supreme Court recused from hearing this action. On June 4, 2012, Presiding Justice Dan Biles appointed two Kansas Court of Appeals judges and three district

[5] Comment 3 to Rule 2.11 acknowledges "[t]he rule of necessity may override the rule of disqualification," but then illustrates when that may occur with the example of reviewing a judicial salary statute. In a judicial salary case, unlike here, *all* judges would be potentially affected by the outcome. But here, the judges of the Court of Appeals are *not* directly affected by whether the Kansas Supreme Court or local district court judges select the chief judge in each judicial district.

court judges to serve temporarily on the court to participate in the hearing and decision of this matter.").

Article III, section 2, of the Kansas Constitution—which provides that "[a]ll cases shall be heard with not fewer than four justices sitting"—is not a barrier to the recusal of the Supreme Court Justices in this case. Read in context, this provision plainly refers not only to the regular members of the Supreme Court but also to judges temporarily assigned to serve on the Supreme Court. This reading is confirmed by the sentence in this constitutional provision that states, "the concurrence of a majority of the justices *sitting* and of not fewer than four justices shall be necessary for a decision."

If the word "justice" in this context referred only to the regular members of the Court, the votes of judges temporarily assigned to the Supreme Court would *never count*, despite the fact that Article III, section 6(f) plainly authorizes the temporary appointment of district court judges. That would be an odd (and textually unnecessary) result. The better interpretation is that Article III, section 2, requires at least four members of the Supreme Court (whether those four are Justices or temporarily assigned judges *sitting* as Justices) to hear every case, and that each case be decided by the concurrence of a majority of those judges sitting, with no fewer than four judges in the majority.[6]

[6] This Court's practice also reflects this interpretation of Article III, section 2. For instance, in *State v. Aguirre*, 301 Kan. 950, 349 P.3d 1245 (2015), this Court split four to three, with Senior District Judge Malone (serving as a temporary appointment to the Supreme Court), in the majority. If the word "justice" in the phrase "the concurrence of a majority of the justices sitting and of not fewer than four justices shall be necessary for a decision" refers only to actual Justices of the Court, there would have been no decision in the case, since the *actual* Justices split three to three. Article III, section 2.

V. This Case Should Be Heard by the En Banc Court of Appeals or, Alternatively, by Randomly Selected Court of Appeals Judges.

If the regular Justices of the Kansas Supreme Court are recused in this appeal in order to cure the problems identified above, any method for selecting alternate jurists to sit in this case must not itself generate any further appearance of impropriety. "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause." *Caperton*, 556 U.S. at 886. After all, the entire point of recusal would be to shed any appearance of bias or partiality that would arise from the regular Justices' direct interest in the outcome of this case. The benefits of recusal to the Court, to the parties, and to the public generally would be lost if the selection of replacement jurists gave rise to new concerns of bias or partiality because the Court handpicked the temporary "Justices" to serve as replacements for the recused Justices.

Kansas law and practice permits the appointment of district court judges, Kan. Const. art. III, § 6(f), senior/retired judges, K.S.A. 20-2616, or Court of Appeals judges, K.S.A. 20-3002(c), to sit on the Supreme Court in lieu of recused justices; *see also Kline*, 298 Kan. at 97 (appointing both Court of Appeals and district judges to sit on the Supreme Court). Because this appeal directly involves the selection of *chief district judges*, the first two options will fail to completely cure any appearance of partiality problems; in fact, appointing district judges would readily and obviously give rise to at least the appearance of partiality. No reasonable, objective observer would consider that an appropriate solution.

The opinion column authored and issued by Chief Justice Nuss further drives this point home. In that column, he clearly stated that *all 31 chief judges* opposed 2014 House Bill 2338. He further stated the Kansas District Judges' Association only expressed formal, public support for the legislation because of threats and legerdemain, implying that the KDJA in fact opposed

the merits of the legislation. Exhibit C. Whether or not the Chief Justice was correct on both points, appointing any current or senior district court judge to decide this case would necessarily carry the significant risk of a reasonable perception of bias because the replacements would be drawn from a pool the Chief Justice already has publicly identified as sharing the Justices' disqualifying predisposition.

The only acceptable option is to wholly eliminate any such risk by appointing judges of the Kansas Court of Appeals to decide this dispute. The Kansas Court of Appeals judges have no direct stake in the question whether the Supreme Court or the local district judges of each judicial district ultimately select the chief judge of each such judicial district.

Further, the method of selecting *which* judges of the Court of Appeals should sit as the Supreme Court for this case also must be such that no reasonable, objective observer might conclude any recused Justice or the Court handpicked their judicial replacements for this case. Thus, the State suggests two possible methods, both of which are authorized by Kansas law and which would ensure public confidence in the fairness and impartiality of the tribunal.

First, this appeal could be heard by the Court of Appeals sitting en banc. That result could be accomplished by this Court appointing *all* of the judges of the Court of Appeals to temporarily serve on the Supreme Court as authorized by K.S.A. 20-3002. The State notes that the Court of Appeals is already scheduled to hear another case (*Hodes & Nauser v. Schmidt*, No. 15-114153-A) en banc on December 9, 2015, the day before this case is set for oral argument. Although this Court typically appoints a single judge to temporarily replace a recused Justice, the appointment of the entire Court of Appeals is authorized and appropriate here. Both K.S.A. 20-3002(c) and Article III, section 6(f), of the Kansas Constitution contemplate that judges may be temporarily assigned to the Supreme Court *in addition* to the regular Justices, and not merely in

place of recused Justices or vacant seats. Indeed, nothing in the Kansas Constitution caps the size of the Supreme Court at seven Justices. Given the unprecedented situation here, having the entire Court of Appeals hear the case makes a great deal of sense.[7] Such an approach would avoid *any* possible appearance of selection impropriety; there simply could be no risk of real or perceived bias.

Second, randomly selected Court of Appeals judges who would replace the recused Justices could hear this appeal. Random selection minimizes or avoids the appearance of partiality that might otherwise result from allowing recused Justices to handpick their own replacements.

Conclusion

The State respectfully requests that the Justices of this Court recuse themselves from the appeal in this case. The State further requests that the Court have the Court of Appeals hear this appeal en banc or, in the alternative, provide for random selection of Court of Appeals judges to replace recused Justices. The State further requests an extremely expeditious ruling on this motion, given that the scheduled oral argument is precisely one month from the date of this motion and the recusal circumstances here are unprecedented.

[7] In an analogous situation, federal law provides that when the United States Supreme Court lacks a quorum of qualified justices in a direct appeal from a district court, the Supreme Court may send the case to be heard and decided by the court of appeals for the district sitting en banc. *See* 28 U.S.C. § 2109.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
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By: /s/ Dwight Carswell

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CERTIFICATE OF SERVICE

I certify that on the 10th day of November 2015, a copy of the above motion was electronically transmitted via the Court's electronic filing system, electronically mailed, and mailed postage prepaid to:

Pedro L. Irigonegaray
Elizabeth R. Herbert
1535 SW 29th St.
Topeka, KS 66611

Attorneys for Plaintiff

and copies were mailed, postage prepaid, to:

Randolph S. Sherman
Kaye Scholer, LLP
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Matthew Menendez
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Attorneys for Plaintiff

/s/ Dwight Carswell
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Assistant Solicitor General

Exhibit A

Testimony of Steve Grieb,
General Counsel to the Chief Justice
in Opposition to 2014 SB 365

February 17, 2014

Senate Judiciary Committee
Testimony in Opposition to SB 365

Steve Grieb, General Counsel to the Chief Justice
Kansas Judicial Branch
griebs@kscourts.org

SB 365 would amend current law to provide that the district judges of each judicial district would elect their chief judge. Under current law, the Supreme Court appoints the chief judge of each of the 31 judicial districts. The Court as a whole seeks input from each district as to who is interested in being chief judge, and who would make a good chief judge. Because each associate justice serves as a departmental justice, the justices have a close working relationship with the judges within their departments and are able to gauge each judge's experience, abilities, and desire to serve as chief judge. Departmental justices individually seek input from the judges and others within a district regarding the appointment of the chief judge, and the matter is discussed by the Court as a whole, and the Court then decides based on all of those inputs and experiences. While this process may occasionally leave one or more judges within a district unhappy about the appointment, it has worked very well for a very long period of time. The new process defined in SB 365 certainly does not guarantee an improvement, and will not assure at all that all judges will be happy with the elected chief judge or with the election process. And the current system does help to assure a good working relationship among the Supreme Court, the departmental justice, and the chief judge.

Good general management principles show that those leading a system of any type should put in place good leaders to assist in collaboratively, cooperatively, efficiently, and effectively managing the system. This Senate Committee operates that way – Senator King was SELECTED as Chair by Senate leadership based on its assessment of his abilities, NOT after the committee members voted him into his position as Chair. That makes sense, and it makes sense that the Court's system of selecting chief judges continues as it has for the many years it has been in effect – let the highest and constitutionally mandated administrative authority over the system select the managers of the system. In private sector businesses, it is difficult to imagine a scenario under which employees would select their supervisors, or lower level managers would select the company president. Those vested with the authority and responsibility for carrying out a corporate mission should be able to choose those persons they trust and know will best carry out supervisory or administrative responsibilities.

Amending current law to have district judges elect their chief judge would be analogous to changing Senate practices to have committee members elect their chairs, or to amending current law regarding the Executive Branch to have the division heads within the Department of Administration elect the Secretary of Administration or having all the employees of the Department of administration elect the Secretary. There certainly is no guarantee this would result in better leadership or a better working relationship between the Secretary and the

Governor, but it is almost certainly guaranteed to take time away from the employees' work duties and could result in divided loyalties.

Chief judges are the administrators or managers of their judicial districts. Their job is easiest when the employees they manager are managed well, and when those who have placed them in a managerial position work well with them. While this is difficult to achieve, managers constantly strive to attain this balance. The current system has worked well for decades, requires no change, is not broken, and should not be broken.

SB 365 also appears to conflict with the provisions of Article 3, Section 1, of the Constitution of the State of Kansas, which provide:

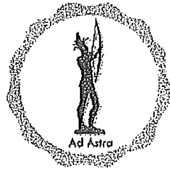
> The judicial power of this started shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The Supreme Court shall have general administrative authority over all courts in this state.

The appointment of chief judges is clearly within the administrative authority of the Supreme Court. The appointment of chief judges by the Supreme Court is necessary for the smooth administration of the court system. The Court relies on the chief judges to operate the system and seeks input frequently from the chief judges as to how best do that. And the chief judges frequently provide unsolicited input that helps the Court. The current process helps to ensure statewide uniformity in all significant matters of administration. An important reason for the enactment of court unification in the 1970's was statewide uniformity, and this bill is not consistent with that goal, nor with the recommendations of the Blue Ribbon Commission for increasing efficiency.

Thank you for the opportunity to testify and I would be happy to answer questions.

Exhibit B

Testimony of Chief Justice Nuss
in Opposition to 2014 SB 364



SUPREME COURT OF KANSAS

KANSAS JUDICIAL CENTER
301 S.W. 10TH AVENUE
TOPEKA, KANSAS 66612-1507

LAWTON R. NUSS
CHIEF JUSTICE

785-296-5322
kansascj@kscourts.org

February 17, 2014

Re: Senate Bill 364

Dear Members of the Senate Judiciary Committee:

I was informed on Wednesday February 12 that SB 364 had materialized earlier in the week. I was later informed that this new bill had been scheduled for hearing in your committee on Monday February 17. Perhaps because of this short time frame, no one has told me what problems the bill claims to solve by giving each of the Judicial Branch's 31 judicial districts its own budget.

These recent developments are in sharp contrast to how our present unified court system was created, *i.e.*, after years of study and debate. As you know, that system calls for one budget for the entire Judicial Branch. And the Supreme Court administers that budget per its power granted by the people of Kansas under Article 3, Section 1 of our Constitution. That section provides in relevant part that, "The supreme court shall have general administrative authority over all courts in this state."

HISTORY

Some background details perhaps would be of assistance to this committee as it considers SB 364. In March 1968, the legislature created the Citizens Committee on Constitutional Revision. After nearly a year-long study, the Citizens Committee released its report in February 1969. Its recommended changes included revisions to Article 3 of the 1859 constitution in order "[t]o create a unified court with overall administrative and procedural rule-making powers in the supreme court branch thereof."

The Citizens Committee's recommended amendment to Article 3 was submitted to the Legislature. After debate and some changes, the required two thirds majorities of both chambers passed a proposed amendment in March 1972. That amendment struck the constitutional language that vested the judicial power in the state in "a supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court." It also added language – that "the supreme court shall have general administrative authority over all courts in the state."

In November 1972, the people of Kansas, in a statewide election, voted to approve this amendment to their 1859 constitution. The approved language was, and remains today, as follows:

> "The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in the state."

In March 1973 the Legislature authorized the Chief Justice of the Supreme Court to appoint the Judicial Study Advisory Committee (JSAC). He did so, appointing as chairman Edward F. Arn – former Kansas Attorney General, Supreme Court Justice, and two-term Governor.

After approximately one year of study, the JSAC released its report in May 1974. Chairman Arn's letter accompanying the report stated that the committee was in "complete agreement" with the report's underlying premise that

> "The adoption of the new Article 3 of the Kansas Constitution, in November 1972, *was a mandate from the people of Kansas to proceed now with the task of modernizing the Kansas judicial system in keeping with the philosophy of Article 3.*" (Emphasis added.)

His letter further provided that the report included "recommendations for improving the Kansas judicial system which the committee deems *necessary to develop a modern, unified court system* under the new judicial article of the Kansas Constitution." (Emphasis added.)

The granting to the Supreme Court administrative authority over all state courts was the subject of JSAC's recommendation No. 33. It provided: "The supreme court, as mandated by the revised judicial article of the Kansas Constitution, should exercise administrative authority over the unified court system, determining overall policy by rules of the Supreme Court."

In JSAC's discussion of this recommendation, it emphasized the importance of the Supreme Court's ultimate authority in administrative matters:

> "The people of Kansas, in the recently adopted judicial article of the Kansas Constitution, wisely vested ultimate administrative authority over the Kansas courts in the supreme court. This is in accordance with sound principles of judicial administration . . ."

The particular issue of the Judicial Branch budget was the subject of JSAC Recommendation No. 44. It clearly provided: "There should be a single budget for the unified Kansas court system." And the JSAC emphasized the critical connection between a single Judicial Branch budget and the responsibility for administering justice:

> "A single court system budget prepared by the supreme court would strengthen that court's exercise of supervisory power over the court system. Although not completely determinative, the funds available to the courts have a bearing on the quality of justice delivered. *If the Supreme Court is to be responsible for the quality of justice delivered in Kansas, it ought to have the power to allocate the funds available to the courts.*" (Emphasis added.)

JSAC also accurately observed the financial soundness of giving the Supreme Court budgetary power over all Kansas courts:

> "Further, giving one body, the supreme court, budgetary power over all the courts will permit the rational planning and control of court expenditures heretofore unavailable, because many agencies separately were passing on court budgets. Indeed, it is possible that efficiency in the use of court resources, and perhaps savings, might result from this kind of overall monitoring of court expenditures."

Per these JSAC recommendations, legislation was passed consistent with the people's mandated constitutional change in 1972. This included unification of all courts in 1977, and establishment of one budget for the entire Judicial Branch. See, *e.g.*, 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.")

VIEWING SB 364 AGAINST THIS HISTORY

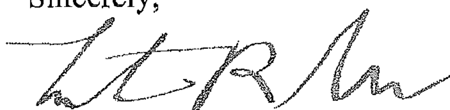
But SB 364 requires each of our 31 judicial districts to possess its own budget. So the bill appears to reject the "mandate from the people of Kansas" to modernize the Kansas judicial system per amended Article 3 of the Kansas Constitution. And SB 364 appears contrary to the recommendations of the 1974 JSAC 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.

The BRC clearly recommended *increased*, not decreased, uniformity among the district courts—all under the direction of the Kansas Supreme Court. One of many examples include its recommendation for establishing a statewide, uniform e-filing system. Some other examples include recommendations for having the Supreme Court "promote statewide development of district court best practices" and "implement uniformity in court processes and procedures in all judicial districts."

So if this 37-year-old unified court system is to possibly be changed, why not let the people of Kansas change their mandate through a majority of a statewide vote on a constitutional amendment? Or if 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 late 1960's and again in the early 70's? Either option would greatly benefit Kansans.

Thank you for this opportunity to be heard.

Sincerely,



Lawton R. Nuss
Chief Justice

LRN/sm

Exhibit C

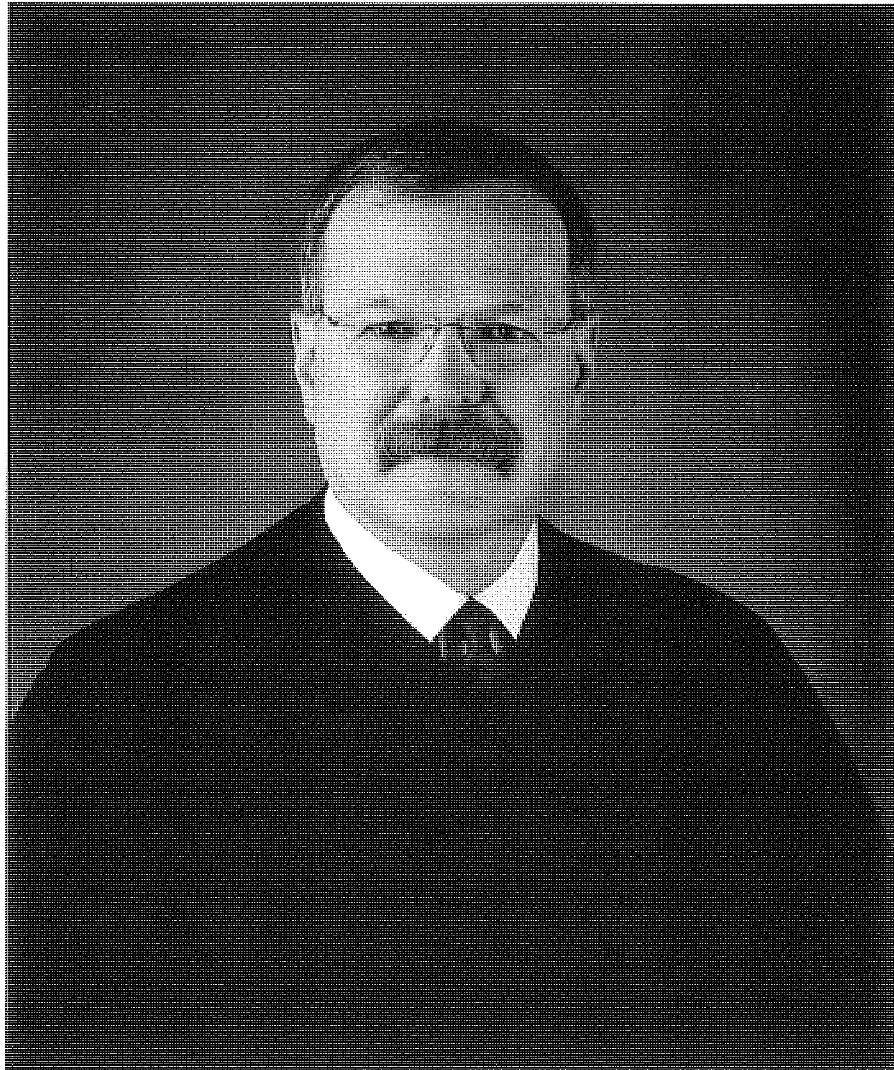
Opinion Column by Chief Justice Nuss

AS I SEE IT MARCH 17, 2014

Kansas Legislature threatens judges' independence

HIGHLIGHTS

"In a recent legislative proposal, linking money to other court issues can no longer be denied. It is glaring," writes Lawton R. Nuss, who has served on the Kansas Supreme Court since 2002 and as chief justice since 2010. "Instead of pay raises, this time legislative money is being offered to keep all Kansas courts open after July 1 — in direct exchange for some important judicial branch restructuring."



By Lawton R. Nuss

Last year certain legislators tried to change the people's constitutional process for selecting Kansas Supreme Court justices. Several sought endorsement of their proposal by the Kansas District Judges Association (KDJA). After the endorsement attempt failed, one legislator vigorously denied linking support for changing the selection process to providing funding of overdue pay raises for judicial branch employees.

A recent legislative proposal, linking money to other court issues can no longer be denied. It is glaring.

Instead of pay raises, this time legislative money is being offered to keep all Kansas courts open after July 1 — in direct exchange for some important judicial branch restructuring. The money would be given if the KDJA endorsed the "package deal" which includes changing the statewide unified court system in two fundamental ways.

First, it allows the chief judge in each of Kansas' 31 judicial districts to submit and control his or her own budget. Second, it allows the judges in each district to choose their own chief judge. The Supreme Court has exclusively exercised the authority for both actions since the late 1970s.

All 31 chief judges oppose it. Chief judges and justices alike ask, "What needs fixing?"

One legislator told the KDJA that without a positive statement about the entire package, it would fail. The money for keeping the courts open would then be lost. And no other legislative revenue proposal for keeping courts open was planned. In other words, no endorsement means closed courts. So while disagreeing with a significant part of the package, the executive committee concluded, "The KDJA can accept (it), because the courts of Kansas will be allowed to remain open for business." The Senate approved the package within hours.

The Supreme Court strongly opposes the package. Most objectionable is the diffusion of the unified court system's centralized authority in exchange for money to keep Kansas courts open.

Some argue this Senate action violates the people's constitution. The 1968 Legislature's "Citizens' Committee" recommended all the courts be unified, modernized and administered by one central authority. This recommendation was followed by a 1972 statewide election in which Kansans voted to add this language to their constitution: "The supreme court shall have general administrative authority over all courts in this state."

Acknowledging this mandate for unification and modernization, a later committee chaired by former two-term Republican Gov. Edward Arn specifically recommended one budget for the entire judicial branch.

I express no opinion on the constitutionality of the package because if it is challenged in a lawsuit the Supreme Court may need to answer that question.

But as the package moves through the House of Representatives, Kansans should ask themselves at least two questions:

First, is this package true to the will of the people when they voted to change their constitution?

Second, if Kansans start down the road where judges feel compelled to help bargain away the court's authority, where does that road end?

Will otherwise fair and impartial judges be asked to decide court cases the way some legislators want them to be decided — in exchange for money to keep the courts open for the people of Kansas they

all are supposed to be serving?

RELATED CONTENT

MORE AS I SEE IT

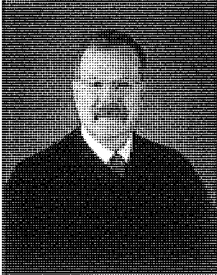
Exhibit D

Press Release by the Supreme Court
April 18, 2014

In criminal cases that could result in incarceration, videoconferencing will be used only to the extent it does not interfere with the defendant's right to confront his or her accuser. However, some criminal defendants are already appearing by videoconference for procedural hearings, which saves courts transportation and security costs.

In civil cases, it will allow certain witnesses to appear by videoconference from another location, saving the witness time and parties to the case money. According to the recommendations, video testimony is generally allowed, but the opposing party has the opportunity to contest it.

For lawyers arguing before the Kansas Court of Appeals, the opportunity to appear by videoconference means no need to travel to Topeka or another location where a three-judge panel has convened. This means considerable savings for the lawyers' clients.



Chief Justice Lawton Nuss

"The committee has wisely taken more than a year to thoroughly review this complex topic," said Chief Justice Lawton R. Nuss. "While videoconferencing has the potential to save resources for many, we agree with the committee that the people of Kansas should have an opportunity to read the report and make suggestions."

The Judicial Branch Videoconferencing Committee recommendations are available in the What's New section of the Kansas Judicial Branch website. Public comment may be made by June 21, 2014, to Kathy Porter at porterk@kscourts.org.

FOR IMMEDIATE RELEASE: April 18, 2014

For more information
contact Lisa Taylor
785-296-4872

Supreme Court issues statement on Senate Substitute for House Bill 2338

TOPEKA—The Supreme Court of Kansas released this statement on learning Senate Substitute for House Bill 2338 was signed by the governor.

"The Supreme Court of Kansas has strongly opposed this bill 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 Kansans deserve better."

FOR IMMEDIATE RELEASE: April 18, 2014

For more information
contact Lisa Taylor
785-296-4872

Court of Appeals Chambers Counsel receives Topeka Bar Association award

TOPEKA—Kansas Court of Appeals Chambers Counsel Doug Shima received the Honorable E. Newton Vickers Professionalism Award from the Topeka Bar Association at the group's annual meeting April 9.

Shima has worked for the Kansas Judicial Branch since he graduated from the Washburn University School of Law in 1994. He currently serves as Chambers Counsel for Judge G. Joseph Pierron, Jr., of the Kansas Court of Appeals.

Doug Shima

"I am extremely honored and humbled to receive the Newt Vickers Professionalism Award. Professionalism starts with how you treat people. It's the relationships you build, the people you meet, and your involvement with other attorneys and in your community, that make life enjoyable and worthwhile," Shima said. The Topeka Bar Association gives the Honorable E. Newton Vickers Professionalism Award to recognize a member who, by his or her conduct, honesty, integrity and courtesy, best exemplifies, represents and encourages other lawyers to follow the highest standards of the legal profession, including those contained in the Topeka Bar Association Creed of Professional Courtesy.

Shima received the Topeka Bar Association's Outstanding Young Lawyer Award in 1997. He was president of the Topeka Bar Association in 2008/2009, and he currently co-chairs the membership committee. He is a regular contributor to the