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Testimony in Support of Senate Bill 334

Presented to the Senate Judiciary Committee
By Kansas Attorney General Derek Schmidt

January 27, 2016

Chairman King, members of the committee:

Thank you for conducting this hearing on Senate Bill 334 and for the opportunity to testify in support.

The public policy of Kansas long has been that when the validity of a Kansas statute is challenged in court, the attorney general should have the opportunity to appear and present information related to the statute's validity. That general policy is embodied in K.S.A. 60-224(b)(2)(B), K.S.A. 60-1712 and K.S.A. 75-702. A similar policy, adopted out of respect for states, is part of federal law when a state statute's validity is challenged in a federal court proceeding (28 U.S.C. § 2403; Fed. R. Civ. P. 5.1).

Despite these provisions, in at least two recent circumstances a Kansas judge or court has determined a Kansas statute to be invalid and the attorney general's office learned of that determination only after the fact:

- Last summer, the Kansas Supreme Court, in deciding a motion, determined that K.S.A. 20-3301 was unconstitutional. This arose in the context of a criminal case that was being handled by a county attorney. The attorney general's office never was notified the statute's validity was at issue in the case and learned of the matter only by happenstance several days after the court's order had been entered. We then moved the court to reconsider so the matter of the statute's validity might be briefed and argued by the attorney general's office, but that motion was denied.

- In fall 2014, a district court judge in Johnson County entered an administrative order determining that a Kansas statute and a state constitutional provision that then defined marriage were unconstitutional. Because the determination had been made by the judge before the state had any opportunity to present any defense of the statute or constitutional provision, the only option available was an after-the-fact lawsuit filed by the State against the judge.

The underlying issues in the two examples above are irrelevant to the purpose of Senate Bill 334. Hindsight reveals that had the attorney general's office appeared in either or both proceedings, it is doubtful the outcome would have changed. But that is beside the point. The problem this bill seeks to address is not the outcome of those disputes – it is the process that allowed the disputes to be decided before the attorney general's office was told they were underway.

Senate Bill 334 is a belt-and-suspenders measure aimed at plugging the procedural gaps that allowed these two cases to fall through the cracks. It is intended to reaffirm and clarify the public policy that when the validity of a state statute is being tested in court, the attorney general, as the state's chief legal officer, is to receive notice of the dispute and have the timely opportunity to appear in relation to the statute's validity. It also provides an after-the-fact mechanism so that if the notice requirements are violated, an order invalidating a state statute may be set aside once the attorney general learns of the matter.

I am surprised and, frankly, rather disappointed this bill is necessary. But as the old expression goes, "Fool me once, shame on you, fool me twice, shame on me." Twice recently state courts have invalidated state statutes without the attorney general's office knowing a dispute was underway, and in one of those cases the court then further denied our request to rehear the matter with the attorney general's office participating. If that is not the Legislature's intended process, then I encourage you to enact Senate Bill 334.

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