STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

KRIS W. KOBACH
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Testimony of Kansas Attorney General Kris Kobach
Proponent for SCR 1611
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Chair Thompson and Members of the Committee:

In the 67 years that Kansas has used the "Missouri model" of selecting state supreme court justices, it has proven to be a failure. There has been no accountability to the public, and the poor decision making of the court has resulted in the Kansas Supreme Court having the highest reversal rate in the U.S. Supreme Court of any state. There are many reasons why the time has come to return to the popular election of supreme court justices, the system Kansas used from statehood until 1958.

Why the voters of Kansas should have the right to elect their supreme court:

1. Kansas currently uses an oddball system unlike any other. Thirteen states use some version of the Missouri model.[1] However, in 1958 Kansas took the Missouri model and made it worse. Kansas is the *only* state in the country that allows lawyers to control the majority of the seats (5 of the 9) on the judicial nominating commission. If you are a Kansas lawyer, you get to vote for commissioners. *But every other Kansan is denied the right to vote*. It is an elitist system designed by lawyers, controlled by lawyers, and reflecting the political biases of lawyers. That is why the Kansas bar fights so hard to keep it the way it is.

2. The so-called "merit" system produces poor decisions. Kansas is the most-overturned state supreme court in the country. The U.S. Supreme Court has

[1] Alaska, Arizona, Colorado, Florida, Indiana Iowa, Kansas, Missouri, Oklahoma, Nebraska, South Dakota, Tennessee, Wyoming.

overturned the Kansas Supreme Court 87.5% of the time since 2007. It's so bad that the U.S. Supreme court has sharply criticized the Kansas Supreme Court for its poor decision-making. Frankly it's embarrassing. In the Carr brothers case, the Kansas Supreme Court bent over backwards to stop the death penalty from being imposed on the horrific killers. Because there was a federal issue, it was appealable to the U.S. Supreme Court. The U.S. Supreme Court ruled 8-1 in overturning the Kansas Court, with every Justice but Sotomayor joining. The U.S. Supreme Court used the following words in describing the shoddy reasoning of the Kansas Court: "untenable" and "[based on] only the most extravagant speculation" and "beyond reason." *Kansas v. Carr*, 577 U.S. 108, 124, 126 (2016). This kind of language is rarely used to describe the reasoning of another court.

3. States with elected supreme courts have better supreme courts. Contrary to the claim of interest groups who benefit from the current system, it does not actually produce justices with greater "merit." Empirical research indicates that the opposite is the case. Choi, Galati, and Posner measured the productivity, independence, and opinion quality of elected justices versus justices selected through the Missouri model. They found that elected judges were *more productive* (writing more opinions per year) and *more independent* (willing to differ from their colleagues). In terms of quality (number of times cited by out-of-state courts), the systems were essentially equal.[2]

4. Electing justices in competitive elections is the most common system for choosing state supreme court justices. Twenty-two of the states use this method. (Of the 22, 8 use partisan elections[3] and 14 use nonpartisan elections.[4]) The proposed constitutional amendment leaves it up to the legislature to choose whether the elections will be partisan or nonpartisan. But either option is far superior to the deeply-flawed system we have today. Elections create an inextricable link between supreme court justices and the citizens who elect them. In so doing, the supreme court is made accountable to the people it serves.

[2] Stephen J. Choi, G. Mitu Galati, and Eric Posner, Professionals or Politicians, unpublished manuscript (2007) at 39, 27, 15. (Cited in Bonneau and Hall at 136-137). The elected justices were cited more times overall. The Missouri model justices were cited more times per opinion.
[3] Alabama, Illinois, Louisiana, New Mexico, Ohio, Pennsylvania, Texas, and West Virginia.
[4] Arkansas, Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, Wisconsin.

5. Polling shows that the people of Kansas overwhelmingly prefer electing supreme court justices to the status quo. Recent polling of Kansans by WPAi indicates that 74% prefer electing justices versus only 20% who favor the *status quo*. Interestingly, Democrat and Republic voters support it almost equally, with 75% of Republicans polled and 74% of Democrats polled preferring the democratic election of justices to the *status quo*. The people of Kansas overwhelmingly want the right to vote for their supreme court justices.

6. In controversial cases, there's no such thing as a non-political supreme court decision. Proponents of the *status quo* pretend that the myth of non-political judicial decisions is a reality. It is not. It can be disproven as follows. Many of cases that make it to the state supreme court are controversial and concern questions of high public interest. It is important to understand that in those cases, a plausible legal argument can be made for either side. That is why there are almost always dissenting opinions. Unanimous decisions are rare. In that environment, there is no objective, neutral result that the law commands. There is significant grey area. And that is when a justice's personal preferences and ideological leanings come into play. That is why those of us who litigate appellate cases can so often predict how each justice will vote. Their biases come into play, and we learn what their biases are.

   In those cases, the decisions inevitably reflect the politics or ideology of the justices. The question is, do you want those justices to be acting politically without constraint? Or do you want to impose some restraint on their political impulses. Justices must be held accountable. In a true democratic republic, they are accountable to the people. In Kansas right now, they are accountable to no-one.

Answers to Claims Made by Proponents of the Current System:

Claim: Retention elections in the status quo are good enough to give the people a say. Answer: Retention elections are not real elections in any meaningful sense. *In the 67 years that Kansas has had the Missouri model, no justice has ever been defeated in a retention election*. This mirrors the experience of other states that have retention elections: incumbents lose only 1.3% of the time. In contrast, in the competitive elections of the 22 states that elect their justices in normal elections, incumbents lose

14.9% of the time.[5] The reasons why are obvious: in a retention election where only the incumbent justice's name appears on the ballot, there is no opposing candidate with an incentive to run advertisements informing voters of the incumbent's flaws. And voters are presented with no meaningful alternative to the incumbent justice. As a result, Bonneau and Hall conclude that "retention elections are not really elections in any practical sense."[6]

Claim: Voters won't be able to determine which judicial candidate is most qualified.
Answer: Empirically that is false; in states with judicial elections, more qualified judicial candidates do better than other candidates. Bonneau and Hall studied this very question and found that voters are able to identify, and tend to prefer, judicial candidates with prior experience (either as a district court judge or an appellate court judge). Incumbents facing inexperienced challengers won 59.7% of the time; whereas incumbents facing experienced challengers won 52.2% of the time.[7] Stated differently, in states where supreme court justices are elected, those candidates with prior judicial experience do better in their elections, winning the votes of an additional 4-5% of voters.[8] That is often enough to make the difference between winning and losing an election. As Bonneau and Hall summarized their findings[9]: "[W]e found that voters in state supreme court elections make fairly sophisticated candidate-based evaluations."

Claim: Election spending in judicial elections is a bad thing.
Answer: Election spending in judicial elections produces engaged voters who are more likely to participate. Empirical evidence in the 22 states with popular elections indicates that when money is spent advertising the qualifications and attributes of judicial candidates, voters become far more interested in those candidates. The evidence is seen in the fact that more voters continue all the to the bottom of the ballot and cast vote for the justices rather than "dropping off" and not completing the ballot. Under the current system, an average of 25.16% of Kansas voters who voted for the offices at the top of the ballot drop off and fail to vote in the judicial retention elections at the bottom of the ballot. Bonneau and Hall studied election spending in the 22 election states and found that as spending increases, fewer voters drop off (an increase of 2.4% of voters for every

[5] Chris W. Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* (2009), at 84.
[6] Id. at 90.
[7] Id. at 92.
[8] Id. at 101.
[9] Id. at 133.

increase in spending of one standard deviation).[10] On average, only 12.5% of voters "drop off."[11]

Claim: The Kansas Bar Association (KBA) favors the current system.
Answer: Exactly. The KBA is protecting the special power of Kansas attorneys to control the selection of supreme court justices. No other state in the country allows lawyers to select the majority (5 of the 9) of a nominating commission. Kansas attorneys enjoy a special privilege of controlling the membership of the state supreme court that attorneys in no other state enjoy. The KBA is an interest group. It is hardly surprising that the KBA wants to perpetuate the special privileges of lawyers in the current system.

[10] Id. at 44.
[11] Id. at 130.