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SCR 1611
Testimony in Opposition
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Chairman Thompson, Ranking Member Faust-Goudeau, and Members of the Senate Committee on Federal and State Affairs,

Thank you for the opportunity to provide this testimony. I am here in opposition to SCR 1611, which proposes a constitutional amendment for direct election of Kansas supreme court justices and abolishing the supreme court nominating commission.

Kansas Appleseed is a statewide organization dedicated to the belief that Kansans, working together, can build just, thriving, and inclusive communities that benefit all. In order to ensure a just, thriving, and inclusive future for all Kansans, it is important that partisan politics and harmful policies do not interfere with the rights of all Kansans. This is why we are in opposition to this Resolution.

The sweeping changes proposed in this resolution would turn the Supreme Court over to the whims of party politics and games. Currently, vacancies on the Supreme Court are filled using a merit-based nomination process. Key to this process is the nonpartisan nominating commission, which ensures that candidates for any open seat are selected based on their skills and experience. The commission members are not political officers. This eliminates the influence of party politics on the Supreme Court.

Kansas history is instructive to us on the importance of a nonpartisan nomination process for Supreme Court Justices. In 1956, Fred Hall was Governor, but lost his primary election, leaving him an unpopular and a lame duck governor. At the time, Kansas elected judges and the Chief Justice was William Smith, a party stalwart. The actions Hall, Smith, and John McCuish (Hall's Lieutenant Governor) took next is known as the "Triple Play" scandal. Smith resigned as Chief Justice, because he did not want the newly elected Governor Docking to pick his replacement. Hall then resigned just 11 days before his term ended. McCuish, now governor, immediately appointed Hall to the Kansas Supreme Court. Public backlash was immediate, and in the 1957 session, the Legislature proposed a constitutional amendment requiring a merit based justice selection process. The Amendment overwhelmingly passed the necessary public vote to enshrine it in the state's constitution.¹ The "Triple Play's" political maneuvering and backdoor deals undermined public's confidence in a government with checks and balances, and shook the foundation of fair and impartial courts.

¹ Zeff, S. and Hodapp, M. "TV, The Triple Play, and the Man from Dodge." Humanities Kansas.
<https://www.humanitieskansas.org/get-involved/kansas-stories/people/tv-the-triple-play-and-the-man-from-dodge>

This merit-based system has served Kansans well, and prevented any subsequent scandals wherein partisan politics fully controlled the process. The partisan election process proposed in this resolution would shift the priorities of the justices on the Kansas Supreme Court to emphasize re-election in their decisions rather than faithfulness to the Kansas Constitution. Currently, all justices are not listed by party affiliation when they seek retention and only need majority approval to retain their seat. Under the current system, the justices are not under significant political pressure when making their decisions as voters are evaluating them based on their approval of their decisions rather than on their party affiliation.

Proponents of holding partisan elections for judges, as suggested in this Resolution, will argue that Kansas has an elected government system, so judges should face elections too. However, judges do not gain appointments through partisan elections by design. Judges are not supposed to serve constituents. They serve the Kansas Constitution and the law. We, the people, elect legislators to make the laws and governors to enforce those laws. Courts are unique in that they interpret the law. They cannot impartially consider the interpretation and application of those laws, if they are concerned with public opinion, campaigning, fundraising, and backroom political deals. The merit system ensures the judges to the highest courts in our state have the experience and skills to interpret the law.

This nonpartisan appointment allows the justices to issue their decisions without the threat of a politically motivated response. With a partisan election, justices would be forced to consider the political ramifications of any vote in a case and how the degree to which a decision is partisan may benefit their support. The Kansas Supreme Court would essentially function as a third part of the legislature rather than an independent entity that can apply the law fairly, without the constant pressure to please potential campaign contributors. Other states who have partisan elections like the one proposed here have seen the extreme influence of money and partisan politics enter their courtrooms. For example:

- In Wisconsin \$45 million in dark money was spent on a supreme court justice campaign.
- In Arkansas, elected judges continually spend their time ignoring precedent and trying to overturn each other's opinions based on partisan affiliations.
- In North Carolina, we still see the parties fighting over a court seat that was up for grabs in the November 2024 election.
- Supreme Court election campaign spending has ballooned in the last 20 years, and states where elections determine the appointments are driving that more than 50% increase in campaign spending.²

The increasing influence of donors and political parties are undermining the role of nonpartisan interpreters of the law that the courts are supposed to hold. Despite claims of wanting to democratize the process of Supreme Court elections, partisan elections have the opposite effect.

² Keith, D. "The Politics of Judicial Elections, 2021-2022: 2022 ushered in a new era of record-high spending in state judicial elections." The Brennan Center for Justice. 2024. <https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2021-2022>; Harvel, J. "Legal groups and ACLU decry proposed partisan elections of Kansas Supreme Court." *Topeka Capital-Journal*. 2025. <https://www.cjonline.com/story/news/politics/state/2025/02/11/constitutional-amendment-would-reform-kansas-judicial-selection/78412474007/>; Mathis, J. "Guest Commentary: Republicans push election of justices, politicizing the Kansas Supreme Court process." *The Kansas City Star*. 2025. <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article300078934.html>

Further, moving the Kansas Supreme Court to partisan elections is a direct response and attempt to undermine the will and voice of the people of Kansas. Attempts to return to a partisan election based process are relatively recent, and partisan politics have fueled them. Certain groups and political parties have not liked the Supreme Court's ruling in areas such as education, elections laws, and abortion access. Disguising this proposed change as a democratic judicial reform proposal does not change the fact that it is an attempt to change precedent and rulings on topics like funding education, allowing get out the vote campaigns, and abortion rights. Rights and matters that Kansas voters, regardless of political affiliation, have repeatedly indicated their continued support for.

Even if we remove the fact that the Courts have a unique and different position and function in the government, the voice of Kansans indicates that the merit-based system is working and they approve. A year after their appointment to the Supreme Court, justices' appointment to a six-year term is dependent on a public, nonpartisan retention election. Kansans have overwhelmingly voted to retain appointed justices when they face that vote. Further, in the past, Kansas voters have also indicated their preference for a merit based system. A poll found that over half of voters favored the merit based system, and 76% indicated that they opposed changing the Constitution to allow direct supreme court justice appointments by the governor with Senate confirmation.³ In 1958, when partisan politicians gamed the system, Kansans spoke up and amended the Constitution to institute the merit based system. They have continued to support that same system and the impartiality of the Court since.

In addition to ensuring experience and skills guide qualifications for Supreme Court appointments, the current system provides stability in the interpretation of the law. The selection process proposed in this resolution could result in wild fluctuation in the interpretation of state laws. Research has found that those judges that must retain their seat through partisan elections are more likely to overturn precedent based on party lines.⁴ Further, with each new election, influenced by political whims and campaign money, previous cases may be reinterpreted. This leaves everyone, from businesses to the population as a whole scrambling each time a law is overturned or reinterpreted by a politicized court. For example:

- A popular casebook on torts taught in law schools around the country previously criticized the fully partisan elected Michigan Supreme Court as an example of "judicial politics", based in part on its outlier interpretation of laws well established in other jurisdictions, and its unusually high rate of overturning its own precedent.⁵

No system is perfect, but the merit-based system commission nominated process has proven itself as an effective method of mitigating the influence of partisan politics on Supreme Court appointments. For example:

³ 20/20 Insight LLC, Kansas Likely Voters, Feb 26-Mar 1, 2015, <https://www.brennancenter.org/sites/default/files/2015%202020%20Insight%20Kansas%20Poll.pdf> in Robinson, F. J. to the Senate Committee on Judiciary. 2022. Kansas Bar Association. https://www.kslegislature.gov/li_2022/b2021_22/committees/ctte_s_jud_1/documents/testimony/20220304_12.pdf

⁴ Miller, M. G. and Tuma, M. D. "Stare Decisis and the Electoral Connection: Do Retention Systems Affect the Judges' Deference to Precedent?" *State Politics and Policy Quarterly*. 2019.

⁵ Robertson, Powers, Anderson & Wellborn, Cases and Materials on Torts (3d ed), p 283.

- Most states use a nonpartisan selection method to appoint justices. In fact, 26 other states use a nominating commission similar to the merit based system we have in Kansas.⁶
- Further, no states that have a merit based system for supreme court appointments has made the change to partisan elections of judges. Voters in states where attempts to replace the merit system with elections like the one proposed in this resolution have overwhelmingly rejected such attempts.⁷
- Best practices and a significant body of research indicates that merit selection provides public participation while maintaining the integrity of the courts' impartiality.⁸

Justices must have the independence to make informed legal rulings. Kansas is a better state when the branches of government are independent. Radical attempts to change the constitution every time there is a ruling that some may disagree with do not serve Kansans. The history of the Court since 1958 has shown that the best way to ensure a fair and effective judicial system is to have a process where the most qualified candidates serve on the bench, not just the most politically expedient candidates.

Kansans need and deserve judges who are neutral, impartial, and fair decision makers influenced only by the law and the facts of the cases presented to them. The nominating commission has continued to provide highly qualified justices who are not beholden to the partisan political forces in the state. I urge you, too, to oppose this Resolution and not take Kansas back to the days where political games and backroom deals took precedence over faithful interpretation of laws and policies by highly qualified appointees.

Thank you,

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⁶ Brennan Center for Justice. "Significant Figures in Judicial Selection." 2023. <https://www.brennancenter.org/our-work/research-reports/significant-figures-judicial-selection>; Brennan Center for Justice. "Judicial Selection: An Interactive Map." 2024. <https://www.brennancenter.org/judicial-selection-map>

⁷ Robinson, F. J. to the Senate Committee on Judiciary. 2022. Kansas Bar Association. https://www.kslegislature.gov/li_2022/b2021_22/committees/ctte_s_jud_1/documents/testimony/20220304_12.pdf

⁸ Research cited in Robinson, F. J. to the Senate Committee on Judiciary. 2022. Kansas Bar Association. https://www.kslegislature.gov/li_2022/b2021_22/committees/ctte_s_jud_1/documents/testimony/20220304_12.pdf