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To: Representative John Barker, Chairman
Members of the House Judiciary Committee

From: Lynn R. Johnson, Esq.
Shamberg, Johnson & Bergman, Chartered, Kansas City
On behalf of the Kansas Association for Justice

Date: February 11, 2015

RE: HCR 5004 Constitutional amendment revising Article 3; providing for direct partisan election of Supreme Court justices and Court of Appeals judges; abolishing the Supreme Court Nominating Commission
HCR 5005 Constitutional amendment revising Article 3; allowing the governor to appoint Supreme Court justices and Court of Appeals judges, subject to Senate confirmation; abolishing the Supreme Court Nominating Commission

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial attorneys. KsAJ strongly supports the Kansas Constitution and its provision for the merit selection, Nominating Commission process for Supreme Court justices established by Kansas voters. KsAJ opposes both HCR 5004 (partisan elections for the Court of Appeals and the Supreme Court) and HCR 5005 (governor appoints the Supreme Court and Court of Appeals, subject to Senate confirmation).

HCR 5004 provides for partisan election of appellate court judges and justices. In states where judges in the highest courts are selected by popular election, campaign spending on such elections has risen dramatically. Alabama and Texas elect their Supreme Court justices through partisan election. From 2000-2009, 45 Alabama candidates raised \$40,964,590; and in Texas, 44 candidates raised \$19,197,826. In Michigan, where justices are selected through partisan nomination and non-partisan election, 22 candidates raised \$12,878,776. In Ohio, which uses a partisan primary and non-partisan general selection method, 34 candidates raised \$21,212,389.

The Founding Fathers believed an independent judicial branch was central to preserving not only necessary checks on the executive and legislative branches, but vital to protect individual rights. A selection system that promotes campaigning and campaign fundraising and spending by and on behalf of appellate court candidates will not protect the independence of the judiciary.

Judges have a constitutional obligation to ensure impartiality for all parties that appear before them, and should have greater protection from improper influence than other constitutional officers. Partisan elections chip away at necessary protections that shield jurists because they are forced to campaign and to raise money from campaign donors, who may be current or later appellants before the court.

Worse, partisan elections damage the integrity of the appellate courts as an unbiased tribunal where any citizen's case is reviewed and decided on the merits. Partisan elections damage the public's confidence that decisions are based on the rule of law and not popular opinion, partisanship, or whether the appellants contributed in the last election.

HCR 5005 provides for gubernatorial appointment of both the Court of Appeals and the Supreme Court, with Senate confirmation. The effect of HCR 5005 would be to impose the selection process on the Supreme Court that was enacted by the Legislature in 2013 for the Court of Appeals, and to eliminate the Supreme Court Nominating Commission. If passed and approved, the Governor would fill any vacancies in all 21 positions on the Court of Appeals and the Supreme Court, upon approval of the Senate.

Permitting the Governor to fill vacancies on the appellate courts places enormous power in one branch of government, and in the hands one person. Identifying, interviewing, and recommending a slate of 3 candidates has been the role of the Supreme Court Nominating Commission, a 9 member, voluntary, non-partisan citizen group. Instead of a geographically and professionally diverse citizen commission reviewing applicants and making a recommendation of 3, the governor would have unilateral authority to identify, review, and select 1 appointee, and to conduct the process outside of the view of the public and press.

HCR 5005 provides for Senate confirmation of the governor's appointment. The Senate's post-selection review is not a substitute for the scrutiny given by the Nominating Commission prior to the governor making a final selection from a slate of 3. Instead, Senate confirmation injects politics into the appellate court selection process by making it as partisan as any other legislative matter that comes before the Legislature.

Proponents suggest that the "Federal style" system should be adopted because it is the model envisioned by the Founding Fathers. But they fail to note that the Federal courts are subject to political game playing between the Executive and the Senate, depending on the party of the president, and the majority in the Senate. In January 2013, there were nearly 100 vacancies in the federal court system. But halfway through the 113th Congress, the U.S. Senate Rules were changed by then-Majority Leader Harry Reid, which gutted the threat of a minority party filibuster of the President's judicial nominees. By the time the 113th Congress adjourned, 135 of President Obama's 152 nominations were confirmed by the Democrat-controlled Senate. Now, at the start of the 114th Congress, there is new speculation about the politics of the nomination and Senate confirmation process, because the midterm elections gave control of the Senate to Republicans.

States that have adopted a "Federal style" process have not been immune to similar political wars between the governor and the legislature. In New Jersey, a stalemate between Republican Governor Chris Christie and the Democratic State Senate has delayed filling judicial

vacancies for years. As a result of the logjam, backlogged cases increased by 33%, between 2010-2014. To alleviate the burden, retired judges have been called back to work. But because some of the retired judges are beyond the mandatory retirement age of 70, the practice is being challenged before the Supreme Court of New Jersey, further complicating and delaying an already overburdened justice system.

In comparison to both the Federal courts and states like New Jersey, the Nominating Commission process has not been grounds for partisan fights between the executive and legislative branches, or to political gamesmanship of the executive. Kansas voters established the Nominating Commission process, and enshrined it in the Constitution, to assure that the judicial selection process was as far removed from political maneuvering by the governor as possible.

Polling conducted in Kansas in 2013 by 20/20 Insight LLC found that 61 percent of Kansas voters, including majorities of Republicans and Democrats, opposed amending the Constitution to change the way Supreme Court justices are selected. The polling showed that by a nearly three-to-one margin, Kansans oppose changing the current Nominating Commission process and replacing it with a “Federal style” process that vests significant power in the governor.

Opponents of the current selection process often describe unpopular decisions by a court or a judge/justice as the rationale for change. Changing the selection process to control judicial decision making or in hopes of different rulings is hostile to democratic ideals of an impartial judiciary and the separation of powers. Speculation that Kansas’ appellate jurists are underqualified, represent a minority view point, or are undemocratically selected is unfounded and misrepresents the independent-but-co-equal nature of the judicial branch.

Kansan citizens can be confident that merit selection, and the Nominating Commission, has produced an independent, and qualified, appellate court. Kansas’ judicial branch is not extreme; it reflects the sensibilities of the citizens of Kansas. The most recent Institute for Legal Reform State Liability Systems Ranking Study by the U.S. Chamber (2012) ranks Kansas #8 (Judges’ Impartiality) and #9 (Judges’ Competence). A scholarly study by Adam Bonica (Stanford) and Michael J. Woodruff (New York University) in 2012 ranked state supreme courts by ideology; the Kansas Supreme Court was in the middle or slightly conservative—consistent with Kansans.

The Kansas Association for Justice supports returning the selection process for Court of Appeals judges to the current merit selection process for Supreme Court justices. The Kansas Association for Justice supports making no changes to merit selection for Supreme Court justices. The Kansas Association for Justice opposes HCR 5004 and HCR 5005.