Senate Committee on Judiciary
Testimony in Support of SCR 1621
Presented by Alan Cobb, President & CEO, Kansas Chamber of Commerce

March 4, 2022

Madam Chair and members of the committee,

I am Alan Cobb, the President and CEO of the Kansas Chamber. I am here to speak in support of SCR 1621, which would adopt the "Federal Model" for the selection of Supreme Court Justices in Kansas. I was admitted to the Kansas bar in Sept 1992 and I am currently licensed to practice in Kansas. Obviously the KBA does not speak for all lawyers, though I am a member of the KBA.

Controversy surrounding the way judges are selected is nothing new. In fact, the colonists listed as one of their grievances against George III in the Declaration of Independence the way the Crown unilaterally and without input from the Colonies selected and controlled colonial judges.

Kansas is a unique state in many, many positive ways. Being the only state with the bar controlling the process for the selection of appellate court judges and justices is not one of them.

The notion that only lawyers are equipped with the necessary skills and knowledge to select justices is nonsense and the height of arrogance and elitism. Doctors do not select the board of healing arts, accountants do not select the members of the board of accountancy and university professors do not select the board of regents.

And only one of those, the Board of Regents, even requires Senate confirmation.

But here are some of the crucial State boards that require Senate confirmation:

> Agricultural Remediation Board, the Corporation Commission, State Banking Board, the Human Rights Commission, the Mo-Kan Metropolitan Development District and Agency Compact, the State Court of Tax Appeals, and the Central Interstate Low-Level Radioactive Waste Commission, among others.

Politics Are Part of the Process
Please let's not pretend politics and campaigning are not parts of this process. As licensed attorney in Kansas I frequently receive campaign letters sent to me by a candidate for the Selection Commission. The politics may be more subtle than those present in a campaign for the legislature or the Governor, but they are present nonetheless.

Let's substitute the politics of the many for the politics of the elite few.

The Fallacy of the Application of the Triple Play
Many members of the Kansas bar scream about how we need the "merit system" to prevent another "Triple Play." The sentiments are completely and absolutely irrelevant to the proposals at hand – and dishonest.

The triple-play occurred because the Governor could unilaterally select a Supreme Court justice replacement, without any check from the legislature or "merit" commission. No one is suggesting we go back to that system. So anyone suggestion any of these proposals remotely reaches this to this conclusion is being dishonest or dumb.

The procedure currently used in Kansas for the selection of judges, the so-called "merit system," is dominated by a small special interest group—Kansas lawyers. Because the nominating committee is controlled by a majority of Kansas lawyers, that group has become a powerful gatekeeper to one-third of our state government, all the way from the recruitment and screening of applicants through to the final selection and appointment. When the merit system was introduced and adopted in Kansas, its intent was to remove the process of judicial selection from the political realm. However, it is unrealistic and unwise to expect any powerful group—as Kansas lawyers have become—to function in a political vacuum. The founders of our great democracy understood this well and created a system of political checks and balances to overcome the divisiveness of political faction; and the greatest of these checks was, of course, accountability to the people. The merit system of selection in Kansas has delivered political power to Kansas lawyers far disproportionate to their numbers. And it should come as no surprise that as with any special interest group, Kansas lawyers have an emerging political bias and ideology. Because prospective judges in Kansas must curry favor with the Kansas Bar in order to have a chance at getting through the gate, they must either conform themselves to the political expectations of the Bar or cease to be candidates.

While it is naïve to think that our judicial selection process can ever be devoid of politics, it is not unrealistic to expect that insofar as political considerations impact the selection of the judiciary, those considerations be of the people through their democratically selected representatives. This is consistent with the sacred principle of "one man one vote" which forms the very foundation of our democratic institutions of government. The method of judicial selection currently in place, simply put, is not consistent with this most fundamental rule. The system proposed by HCR 5033 and HB 2770 of gubernatorial appointment with Senate consent, while avoiding the undue political influence peddling which can plague a system of direct election of judges, avoids the equally damning problem of control by an unaccountable societal elite. The founders of our country knew this, and their choice of this selection method of appointment with consent has served our country and the federal judiciary well for centuries.

It is true, our judiciary must be and remain independent of the shifting political sands; able to rule consistently and fairly under the law without fear of reprisal. But judicial independence applies to the judges, not to their selectors. A system of gubernatorial appointment with Senate consent does not threaten judicial independence, as witnessed by the independence of our federal judiciary. It does level the political playing field on which the judicial football is kicked around by making those responsible for selecting our judges accountable to the political will of the people of Kansas.