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**DATE:** March 4, 2022

**TO:** Hon. Kellie Warren, Chairperson  
Senate Judiciary Committee

**FROM:** Joshua Ney, Partner - Kriegshauser Ney Law Group

**RE:** Testimony in Support of SCR 1621 and SCR 1622

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Chairwoman Warren and Members of the Senate Judiciary Committee:

I am a licensed active Kansas attorney, and I strongly oppose Kansas's current judicial selection process. I do not think lawyers should control the selection process for our supreme court justices any more than I think that the corporate CEOs in our state should select our governor or only HR Managers should pick our legislators.

Kansas should be a democracy, not an oligarchy.

**Kansas is the only state with a majority of attorney-elected attorneys controlling its supreme court nominating process**

I previously have studied and written on the Kansas judicial selection process and its outlier status among the 50 states. No other state allows a majority of attorney-elected attorneys to control the nominating process for the supreme court. My peer-reviewed law journal article published in the Washburn Law Journal in 2009 discussed the anti-democratic nature of our selection process and analyzed the process under the Equal Protection Clause and the one-person, one vote doctrine. A main conclusion of my article is that the current process establishes special interest trade group control over the selection of an entire branch of government, and that because Kansas's system is the most extreme version of attorney-controlled judicial selection in the country, it is the farthest from our fundamental ideals of voter equality and democratic legitimacy.

**Less than one percent of Kansans control the selection of the highest court**

Simply because of my choice of profession, I have hundreds and sometimes thousands of times the voting power of most other Kansas citizens in "picking the pickers"—that is, in electing the members of the Supreme Court Nominating Commission who control and limit the pool of three candidates that the governor must choose from when filling a Supreme Court vacancy.

In the 2021 attorney election for statewide chair of the Kansas Supreme Court Nominating Commission, there were 5039 attorneys eligible to vote in the mail ballot

election. The population of Kansas at the time was approximately 2,930,000 people, of which approximately 1,938,560 were registered voters. That means that at most, only 0.17% of total Kansans (less than two-tenths of one percent) and 0.26% of registered Kansas voters were eligible at the time to vote for members who make up a majority of the Kansas Supreme Court Nominating Commission. These numbers are even smaller in congressional district attorney elections—for example, in the CD4 attorney election last year, only 900 attorneys (0.03% of Kansans) were eligible to vote for that attorney member of the nominating commission.

This disparity is exacerbated by the fact that as an attorney, every four years, I vote in *three different elections* that determine the make up of the Nominating Commission: 1) the congressional district attorney member election; 2) the statewide chair attorney member election; and 3) general election of the governor, who appoints the non-attorney minority of commission.

### **Only a small portion of attorneys actually vote**

This disparity is *further* exacerbated by the fact that only 20-30% of eligible attorneys vote in any given nominating commission election. For example, in 2021, I was one of only 1498 attorneys (of the 5039 eligible attorneys) to vote for the statewide chair attorney member. This year, as an attorney, I will vote again for another attorney member of the Supreme Court Nominating Commission, in the CD1 mail-ballot attorney election.

### **Governance by the people or their lawyers?**

Compared to my dentist, I have exponentially greater voting power to affect the selection of our supreme court justices. Our choice of profession is the sole difference in the amount of agency we are given to determine the makeup of our government.

William F. Buckley once quipped: "I would rather be governed by the first 2,000 people in the telephone directory than by the Harvard University faculty."

Personally, when selecting our state's most powerful judges, I would rather be governed by all Kansans than their lawyers.

### **Conclusion**

I stand in support of Kansas judicial selection reform and any proposal seeking to lessen direct attorney control of the selection process for our state's highest court. SCR 1621(Federal Model) and SCR 1622 (Direct Elections) both represent proposals for significant structural improvements to our current flawed system. Either bill, whether by adopting the Federal Model as provided in our U.S. Constitution, or by returning to Direct Elections as provided in our original 1859 Kansas constitution, would enhance the democratic legitimacy of the selection process of our state's court of last resort.