Approved: 3/17/11
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Lance Kinzer at 3:30 p.m. on, February 14, 2011, in Room 346-S of the Capitol.

All members were present except:
Representative Ward

Committee staff present:
Jill Wolters, Office of the Revisor of Statutes
Matt Sterling, Office of the Revisor of Statutes
Tamera Lawrence, Office of the Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Sue VonFeldt, Committee Assistant

Conferees appearing before the Committee:
Representative Lance Kinzer
Derek Schmidt, Attorney General, State of Kansas
Kyle Smith, Assistant Attorney General, State of Kansas

Others attending:
See attached list.

HB 2029 - Charitable health care provider defined to include ultrasound technologist

Representative Colloton made the motion to report **HB 2029** favorably for passage. Representative Ryckman seconded the motion.
Representative Colloton presented a balloon to the committee.
Chairman Kinzer made a substitute motion, to amend the bill, per the balloon,

on page2, line33, following "surgery" by inserting a comma; on Line 32, following "technologist" by inserting "currently registered in any area of sonography credentialed through the American registry of radiology technologists, the American registry for diagnostic medical sonography or cardiovascular credentialing international and". Representative Osterman seconded the motion.

Representative Colloton made the motion to report **HB 2029** favorably for passage as amended. Representative Smith seconded the motion. Motion carried.

HB 2027 - Rules and regulations filing act

Chairman Kinzer called attention to a memo distributed to the committee from Representative Carl Holmes, stating he is very knowledgeable regarding Administrative Procedures Act and recommended the members take time to read the memo. (Attachment 1)

Chairman Kinzer referred the committee to the additional correspondence received from Judge Steve Leben, on behalf of the Judicial Council Administration Law Advisory Committee, in response to the questions raised by the committee during the hearing on January 25 and when the committee previously worked on the bill on February 3. (Attachment 2)

Based on the additional information received from Judge Leben, Chairman Kinzer made a substitute motion to amend Section 1, (b) (2) (A) of the bill to read as follows:

An agency may bind parties, establish policies, and interpret statutes or regulations by order in an adjudication under the Kansas administrative procedure act or other procedures required by law,except that no such order shall be used as precedent in any subsequent adjudication against a nonparty unless the order is:
(i)Designated by the agency as precedent:
(ii)listed in a publically available index, maintained by the agency and published on its website, of all orders designated as precedent;
(iii) published by posting in full on an agency website in a format capable of being

searched by key terms; and
(iv) made available to the public in such other manner as may be prescribed by the secretary of state.

In addition, he stated the word "not" should be added to read "such order shall *not* be used'. Representative Rubin seconded the motion. Representative Pauls suggested a change to take the word "no" out of line 21. The change was made with the permission of the first and the second. Motion carried.

Representative Rubin made a substitute motion to amend the bill to strike the word "nonparty" and insert "person who was not a party to the original adjudication." Representative Brookens seconded the motion. Motion carried.

Representative Patton made a substitute motion to amend the bill to strike Section 4 covering "Guidance Documents". Representative Smith seconded the motion. Discussion followed and motion failed.

Representative Brookens made a substitute motion to amend the bill, Page 1, Line 23, to add:
"(v) not overruled by a court or later adjudication."
Representative Rubin seconded the motion. Motion carried.

Representative Pauls made a motion to report **HB 2027** favorably for passage as amended. Representative Keuther seconded the motion. Motion carried.

The Hearing on **HCR 5006 - State constitutional amendment concerning appropriations of money and expenditure of funds appropriated by law by the legislative branch** was opened.

Proponents:

Chairman Kinzer addressed the committee as the originator and proponent of this bill, providing background information to the committee and explaining why he believes it is important to pass this legislation. He stated he believes the *Montoy* decision in 2005 represents a violation of the separation of powers that should exist between the legislative and judicial branches of government and in our system the Legislature alone may spend the peoples' money, because it is the Legislature that is accountable to the people. He also included a copy of Stephen R. McAllister, Professor, University of Kansas School of Law, *Amicus* Brief, *Montoy v. Kansas* with his testimony. (Attachment 3)

Derrick Sontag, State Director, Americans For Prosperity-Kansas, provided written testimony in support of the bill. (Attachment 4)

Mark Tallman, Kansas Association of School Boards (KASB), provided written testimony in opposition of the bill. (Attachment 5)

The hearing on **HCR 5006** was closed.

The Hearing on **HB 2196 - Amending the rules of evidence regarding expert testimony in sexually violent predator commitment cases** was opened.

Kyle Smith, Assistant Attorney General, State of Kansas, appeared before the committee in support of this bill, on behalf of Assistant Attorney General, Christine Ladner, who is responsible for prosecution of sexually violent predators (SVP). This bill would save costs and streamline presentation of evidence by amending the rules of evidence in SVP cases to mirror the Federal Rules of Evidence. The public policy purpose of this bill is to reduce the number of times a child victim must testify about the crimes committed against him or her. (Attachment 6)

Derek Schmidt, Attorney General, State of Kansas, provided written testimony in support of the bill. (Attachment 7)

There were no opponents.

The hearing on **HB 2196** was closed.

Minutes of the House Judiciary Committee at 3:30 p.m. on February 14, 2011 in Room 346-S.

The next meeting is scheduled for February 15, 2011.

The meeting was adjourned at 5:10 p.m.

JUDICIARY COMMITTEE GUEST LIST

DATE: 2-14-11

NAME	REPRESENTING
Megan Pingar	AG
Kyle Smith	AG
Jane Carter	KOSE
Sean Miller	Capitol Strategies
RJ Wilson	ICOSE
Kyle Smith	AG
Abigail Janos	Intern, Rep. Victors
Paulette Blanchard	Intern, Rep. Victors

Rep. Carl Holmes

Notes on HB 2027

Most of HB 2027, as introduced, appears to be a clean-up of existing language. Sec. 4 does contain new language which would permit state agencies to issue guidance documents. The new language would describe those guidance documents as those designated as such by a state agency; those that lack the force of law, and those that state the agency's current approach to or interpretation of law or general statement of policy.

State agencies would be required to maintain an index of all guidance documents, publish the index on its website, make guidance documents available to the public, and file the guidance documents in the manner prescribed by the Secretary of State. Guidance documents may be considered but would not bind the presiding officer or the agency head at an agency adjudication.

Over the years the Joint Committee on Administrative Rules and Regulations has dealt with the issues presented by guidance documents. For example, numerous guidance documents were once used by the Division of Water Resources and the Committee made aggressive efforts at encouraging the agency to transform these guidance documents into actual rules and regulations. At other times, such as with Health and Environment, in dealing with waste water lagoons, the Committee was unclear whether the guidance documents were being used to control who was actually allowed to have a permit. Therefore, the members of the Committee made it clear that guidance documents would not be acceptable in the administration of waste water permitting.

Other comments would be that the guidance documents could be used to avoid the entire rule and regulation promulgation process. And, they might be used in a way which would treat applicants in an unequal manner. Guidance documents may be perceived by the public in an entirely different way than that being described. The general public might perceive them as being a requirement, while the Legislature thinks it is enacting flexibility.

House Judiciary
Date 2-14-11
Attachment # 1

KANSAS JUDICIAL COUNCIL

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MEMORANDUM

To: House Judiciary Committee
From: Judge Steve Leben, on behalf of the Judicial Council's Administrative Law Advisory Committee
Date: February 8, 2011
Re: 2011 HB 2027

Lauren Douglass of the Legislative Research Department forwarded some questions to me regarding HB 2027. I will do my best to respond:

Does "order in an adjudication pursuant to procedures provided by law" refer to agency action under KAPA or orders promulgated in another fashion?

The term is intended to cover both. There is great variety in the procedures used by Kansas administrative agencies. While the Kansas Administrative Procedure Act (KAPA) does govern most agency adjudications in Kansas, its own terms provide that it doesn't govern *all* agency adjudications. See K.S.A. 77-503(a). While we have not tried to locate and list the remaining exceptions, we assume that some agencies use hearing procedures that are set forth in the agency's specific statute rather than in KAPA. By using the term "order in an adjudication pursuant to procedures provided by law," we have attempted to cover decisions by agencies proceeding under KAPA adjudications and by those whose adjudications are still governed by other, agency-specific statutes. In either case, the adjudication does not result in a rule or regulation that need be adopted pursuant to the Rule and Regulation Filing Act, although decisions may have binding legal effects and might otherwise come under the definition of a rule or regulation. If our language is not clear, perhaps it should read "order in an adjudication under the Kansas Administrative Procedure Act or other procedures required by law."

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What is the existing law with respect to the precedential value of orders in adjudications as discussed in (b)(2)(A)?

The traditional rule in Kansas is that the doctrine of *stare decisis*, or adherence to precedent, does not apply to agency decisions. *In re Genstler Eye Center*, 40 Kan. App. 2d 411, 419, 192 P.3d 666, 672 (2008); *In re Appeal of K-Mart Corp.*, 238 Kan. 393, 396, 710 P.2d 1304, 1307 (1985). Thus, an agency is not *required* to follow its own precedents and may change course over time. The limits on the extent of such changes have been stated somewhat differently. An agency may not issue decisions that become so widely inconsistent as to be arbitrary. *Genstler Eye Center*, 40 Kan. App. 2d at 419. Some cases have also suggested or required that when an agency does change positions, it must explain the basis for the change. *E.g., Kansas Industrial Consumers Group, Inc. v. KCC*, 36 Kan. App. 2d 83, 90, 138 P.3d 338, 346 (2006); *Western Resources, Inc. v. KCC*, 30 Kan. App. 2d 348, 360, 42 P.3d 162, 172 (2002).

Still, some Kansas agencies *choose* to have decisions that are precedential and generally followed. There is no caselaw suggesting that agencies may not do so, and courts generally praise the virtues of consistency in adjudication. Thus, although agencies are not required to follow the doctrine of *stare decisis*, it "is a strong factor in building up internal administrative law, and in influencing the judiciary in its reviews of the administrative determinations." *Warburton v. Warkentin*, 185 Kan. 468, 476, 345 P.2d 992, 999 (1959). *Accord Woman's Club of Topeka v. Shawnee County*, 253 Kan. 175, 182, 853 P.2d 1157, 1163 (1993).

Like courts, even an agency that treats its decisions as precedential may change course when it determines that its past decisions are poorly reasoned or incorrect in light of a new argument that's made. We have attempted in this bill to recognize the variety in approach presently in Kansas agency practice, *i.e.*, that some agencies do issue opinions that the agency intends to follow as precedent. For such agencies, we would require that the agency post its precedential decisions in full on the agency website or otherwise disseminate them in a manner approved by the Secretary of State (as suggested in the balloon amendment we submitted January 27). Thus, if an agency has in an opinion it deems precedential interpreted a statute under its jurisdiction in a certain way, the public can learn about that interpretation and follow it. Otherwise, the agency would be precluded from

deciding a contested case involving a third party based solely on the doctrine of *stare decisis*; the agency would have to decide the matter based on other grounds.

Is the intent of this section to give notice that the order could be used against a third party or to give the order precedential value?

The Administrative Law Advisory Committee believed that many agencies currently give their orders a kind of precedential effect and that this practice is generally a constructive one because it helps to ensure consistency in agency decisionmaking. The committee's intent was to make notice to the public a precondition of the agency giving the order prcedential value, which might then be used to the detriment of a third party in a later case. When an agency chooses to give its decisions precedential value, those decisions should be readily available to the public.

Is it the Judicial Council's intent that any order published be on the agency's website or just those going to be used as precedent?

Our intent was limited to dissemination of orders that an agency wanted to treat as precedential: those should be posted in full on an agency website or otherwise disseminated in a manner approved by the Secretary of State, as we suggested in the balloon amendment previously submitted. Many agencies issue hundreds or even thousands of administrative orders per year over questions like food-stamp eligibility. No useful purpose would be served by posting such opinions on the web, and substantial harm to privacy interests might occur through routine posting of all administrative orders by all agencies. Agencies handle many matters involving highly personal or confidential information.

Given the time constraints, I have conferred regarding these responses with the members of the Judicial Council's Administrative Law Advisory Committee but not with members of the Judicial Council. We hope that these responses will be helpful.

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MEMORANDUM

TO: **House Judiciary Committee**

FROM: **Judge Steve Leben on behalf of the Judicial Council Administrative Procedure Advisory Committee**

DATE: **January 27, 2011**

RE: **Proposed Balloon Amendment to HB 2027**

During Tuesday's hearing on HB 2027 amending the Rules and Regulations Filing Act, Chairman Kinzer and other committee members raised a question about Section 1, new K.S.A. 77-415(b)(2)(A), relating to agency orders in adjudications. The bill recognizes an agency's general authority to bind parties, establish policy, and interpret statutes during an adjudicatory proceeding but sought to protect nonparties by providing that "no nonparty to an adjudication may be adversely affected by an order unless the order is readily available to the public." The question was raised, what does "readily available to the public" mean?

After discussing the issue with other members of the Administrative Procedure Advisory Committee via email, the Committee agreed the phrase "readily available to the public" is vague and should be clarified. The Committee recommends deleting the phrase and adding the attached proposed balloon amendments instead.

Our Committee had intended that "readily available to the public" mean something more than simply available upon request. We generally contemplated that agencies would post their orders online but were reluctant to make that the only way for agencies to make orders available since other alternatives might emerge or work better. The proposed balloon amendments will achieve a similar result but also allow for somewhat greater flexibility, such as to use an indexing system if approved by the Secretary of State.

Judicial Council

1/27/11

Proposed Balloon Amendment

Session of 2011

HOUSE BILL No. 2027

By Committee on Judiciary

1-18

AN ACT concerning the rules and regulations filing act; amending K.S.A. 77-438 and K.S.A. 2010 Supp. 77-415, 77-421 and 77-436 and repealing the existing sections; also repealing K.S.A. 2010 Supp. 77-421a.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2010 Supp. 77-415 is hereby amended to read as follows: 77-415. *(a) K.S.A. 77-415 through 77-438, and amendments thereto, shall be known and may be cited as the Kansas rules and regulations filing act.*

(b)(1) Unless otherwise provided by statute or constitutional provision, each rule and regulation issued or adopted by a state agency shall comply with the requirements of the Kansas rules and regulations filing act. Except as provided in this section, any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the Kansas rules and regulations filing act.

(2) Notwithstanding the provisions of this section:

(A) An agency may bind parties, establish policies, and interpret statutes or regulations by order in an adjudication ~~pursuant~~ to procedures provided by law except that no nonparty to an adjudication may be adversely affected by an order unless the order is ~~readily available to the public.~~

the agency designates the order as precedent and

published by posting in full on an agency website

or in such other manner prescribed by the secretary of state.

(B) Any statement of agency policy may be treated as binding within the agency if such statement of policy is directed to:

(i) Agency personnel relating to the performance of their duties.

(ii) The internal management of or organization of the agency.

No such statement of agency policy listed in clauses (i) and (ii) of this subparagraph may be relied on to bind the general public.

(C) An agency may provide forms, the content or substantive requirements of which are prescribed by rule and regulation or statute, except that no such form may give rise to any legal right or duty or be treated as authority for any standard, requirement or policy reflected therein.

(D) An agency may provide guidance or information to the public, describing any agency policy or statutory or regulatory requirement

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STATE OF KANSAS
HOUSE OF REPRESENTATIVES

TOPEKA

LANCE KINZER
REPRESENTATIVE, 14TH DISTRICT

COMMITTEE ASSIGNMENTS
CHAIRMAN: JUDICIARY
VICE-CHAIRMAN: CORRECTIONS AND JUVENILE JUSTICE
MEMBER: JOINT COMMITTEE ON STATE-TRIBAL RELATIONS
RULES & JOURNAL

February 14, 2011

TESTIMONY REGARDING HCR 5006

"Pubic respect for judicial decisions is earned. It is earned by the competence, diligence and restraint of judges. Judicial decisions that fail to exhibit those qualities undermine public confidence in the courts as the interpreters, rather than the creators, of the law. Throughout American history, the most grievous wounds that courts have suffered were self-inflicted."

Stephen R. McAllister, Professor, University of Kansas School of Law, *Amicus* Brief, *Montoy v. Kansas*

HCR 5006 is a proposal that was extensively debated in the form of HCR 5003 and its Senate counterpart SCR 1603 during the 2005 Special Session. The Senate passed the proposal with the necessary 2/3 vote, a majority supported the measure in the House but it failed to garner the 2/3 vote required. Through that process I had the opportunity to reflect upon the many arguments raised on both sides of this important issue. This testimony attempts to consider those arguments in the broader context of what is at stake when we debate where the appropriation power should properly be vested given our system of government.

Article 2 § 24 of the Kansas Constitution currently provides that "No money shall be drawn from the treasury except in pursuance to a specific appropriation made by law." The proposed amendment would retain this language but add the following:

The executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money or to redirect or limit in any fashion an appropriation already made by law, except as the legislative branch may provide by law or as may be required by the constitution of the United States.

In framing this issue I would like to turn to James Madison who as one of the primary authors of our Federal Constitution wrote that "No political truth is of greater intrinsic value than that... [placing the] authority of the legislative and judicial power in the same hands is the very definition of tyranny."

It is my belief that the *Montoy* decision in 2005, (as well as the remedies requested in the more recent suitability litigation under Article 6 of the Kansas Constitution), represent a violation of

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Attachment # 3

the separation of powers that should exist between the legislative and judicial branches of government. In our system the Legislature alone may spend the peoples' money, because it is the Legislature that is accountable to them. The confinement of appropriations to the legislative branch under our system of government was not random. It reflected our national ideal that the power of appropriation must be under the control of those whose money is being spent. This basic idea was at the very core of why our country came into being in the first place.

It is important to remember in this regard the uniqueness of the founding of our nation. As historian Gordon Wood of Brown University has written; before the American Revolution, "the colonists knew they were freer, more equal, more prosperous, and less burdened with cumbersome feudal and monarchical restraints than any other part of mankind in the 18th century." Yet they rebelled anyway, why? One need not be a great scholar of American history to know that "no taxation without representation" was the rallying cry of the revolution. As another historian has written, "Viewing the matter calmly from a distance, it must be confessed that no better or more equitable method of taxing the colonies could have been found, that is if it be conceded that England has the right to tax them at all." But it was to this very point that the colonists would not concede, for to them taxation without representation was tyranny. And it was for this very reason that the founders gave control of the purse, of appropriations, to the representative branches alone.

Alexander Hamilton's set out this point very cogently in Federalist # 78:

"Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The Legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever."

Now either Hamilton and Madison were correct or they were incorrect. And if they were correct then judicial edicts directing the appropriation of money cannot be squared with our system of government. I would further suggest that the framers of the Kansas Constitution and indeed the Courts of this State for most its history have agreed with this point. The Kansas Constitution, in its current form places the appropriation power under Art. 2, the section that sets forth legislative powers. Section 24 of Article 2 provides that, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." I would contend that virtually every criticism that I have heard directed at the proposed amendment applies with equal force to the existing constitutional provision as traditionally interpreted.

To prove my point I'd direct the committee's attention to the case of *Panhandle Eastern Pipe Line v. Fadley,* decided by the Kansas Supreme Court in 1962. In that case Panhandle Pipe Line paid a severance tax that was later declared unconstitutional. The district court found, reasonably enough, that they were entitled to a refund and issued an order directing the same. The Kansas

Supreme Court found this order to be inappropriate because courts lack the authority to issue orders that cause money to be drawn from the state treasury. Indeed the Kansas Supreme Court of that day wrote that Article 2 § 24 is an "insurmountable constitutional provision" even in the face of a case where the Court itself recognized that "morally and in good conscience it would seem plaintiff is entitled to recover." In other words there was a time when the Kansas Supreme Court clearly recognized that it is a Court of limited powers that cannot invade the legislative prerogative over appropriations just because they'd really like to do so in a given case.

As Justice Frankfurter put it, the ultimate touchstone of constitutionality is the language of the constitution itself. With this in mind I would suggest that the Court in *Montoy* abandoned fidelity to the language of the Kansas Constitution, both in the remedy it ordered and in its underlying analysis of the substantive Article 6 question before it.

Now in saying that I know full well that some have argued the contrary, that the Court in *Montoy* had no choice but to reach the result and impose the remedy that it did. This is simply not the case. School finance litigation has occurred in many states and courts across the country have proven by their actions that many remedies were available to the Court short of directing a specific appropriation.

Furthermore, the underlying opinion itself was an example of judicial overreaching that stands in sharp contrast to the action of many other courts. One example is found in the case of *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996). In that case, Article 10, Section 1 of the Illinois Constitution states that the Illinois legislature must provide "high quality educational institutions and services." Despite a standard arguably much higher than the "suitable provision for finance language" in the Kansas Constitution, the Illinois Supreme Court said this:

What constitutes a "high quality" education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion."

The Court did not have to act as it did in Montoy as to either result or remedy. They could have confined themselves to the text of the constitution as the Illinois Court did. And with the Illinois Court I would contend that it is a "transparent conceit" for the Kansas Supreme Court to claim that its order requiring the legislature to appropriate a specific amount of money for K-12 education is derived from the actual language of the Kansas Constitution in any meaningful sense.

Indeed, one of the most shocking aspects of the Montoy decisions is the fact the Court specifically listed its "role as defined by the Kansas Constitution" as merely one of many factors to be considered in deciding the case. The Court has explicitly stated that its role as defined by the Kansas Constitution is not an absolute boundary to its authority, but merely a factor to be considered. This is astonishing to say the least.

As University of Kansas School of Law Professor Stephen Macalister noted in his *Amicus* brief in the *Montoy* case, "Suitable provision for finance has no judicially discoverable meaning, if any meaning at all. The choices in interpreting such a broad constitutional provision are inherently policy laden, and thus quintessentially legislative, political decisions. Article VI § 6 does not lend itself to judicial definition. That fact alone provides compelling reason for the Court to decline the role of special master of the Kansas Legislature and the Kansas public school system."

While the context was slightly different the United States Supreme Court, in a case alleging insufficient ELL funding in Arizona criticized a lower Court ruling noting that "by requiring petitioners to demonstrate "appropriate action" through a particular funding mechanism, the Court of Appeals improperly substituted its own educational and budgetary policy judgments for those of the state and local officials to whom such decisions are properly entrusted" *Horn v. Florez* (2009). In writing for the Court here Justice Alito raised a key point, similar to the one raised by the Illinois Supreme Court in the *Edgar* case. That in matters of education policy Courts enjoy no particular expertise that would justify substituting their policy judgment on school funding for that of properly elected policy makers.

The Kansas Supreme Court itself once recognized this fact when in *USD No. 229 v. Kansas* (1994) the Court noted, "The funding of public education is a complex, constantly evolving process. *** Rules have to be made and lines drawn in providing 'suitable financing.' The drawing of these lines lies at the very heart of the legislative process and the compromise inherent in the process."

The amendment that I have proposed is nothing more than attempt to clarify what should have been clear already; that the legislature and not the courts have the power of the purse.

What are the consequences if we do not act to reign in the remedy power of the Court as exercised in *Montoy*? First let me suggest that if the Court can order us to spend one dollar it can order us to spend a billion dollars. If we concede the Court's authority to direct appropriations in principle then the only lawful choice must be to obey. If we are to stand up for legislative prerogatives we must do so by working within the system via the amendment process.

I would ask you to consider that if we do not act this may well be only the beginning of judicial edicts regarding appropriations. Consider Article 7 Section 1 which says "institutions for the benefit of mentally or physically incapacitated, and such other benevolent institutions as the public good may require, shall be fostered and supported by law." Now given the Court's

penchant for deciding cases based on dictionary definitions I looked up the word "foster." Webster's says this word means "promote the growth and development of." It is not difficult to imagine the Court one day reading this language to mean we have an obligation to support ever growing programs for the disabled in an amount to be determined by the Court.

I would like to briefly address a few of the more common objections I have heard to the amendment:

First, the amendment is not an attempt to limit the power of judicial review. Rather, it will help see to it that judicial review is conducted as that doctrine has been traditionally understood. I have heard many opponents of the amendment wrap themselves in the *Marbury vs. Madison* decision that established judicial review at the federal level. Curiously, these people never seem to mention that in that case Justice Marshall very specifically disclaimed the notion that Judicial Review provides any justification for the Court interfering with the prerogatives of another co-equal branch of government. Indeed he wrote that, "It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment."

Second, some have argued that Kansas is not bound by the same separation of powers doctrine that constrains the federal courts. Such a position is totally at odds with the traditional understanding of the Kansas Supreme Courts as expressed in cases such as *Van Sickle v. Shanahan* where the Court opined that "The government, both state and federal, are divided into 3 departments, each of which is given the powers and functions appropriate to it. Thus a dangerous concentration of powers is avoided, and also the respective powers are assigned to the department best fitted to exercise them."

Third, some point to cases like the Kansas City, MO school desegregation case, where a Court ordered expenditure of funds and the continuation of a property tax provision without taxpayer approval. It is important to note that in that case the order was directed by a federal court to a school district, not to a co-equal branch of government. The analogous situation to the *Montoy* decision would be one where a federal court had directed the U.S. Congress to appropriate money. This has never happened.

Fourth, some have argued that in a technical sense the Court in *Montoy* did not appropriated funds, but merely ordered the legislature to do so and as such its conduct might survive a technical reading of the appropriations clause. As U.S. Supreme Court Justice Anthony Kennedy once noted in a similar situation, such an argument is a mere conceit as a legislative vote taken under such circumstances clearly blurs the lines of legislative accountability by making it appear that a decision was reached by elected representatives when the reality is otherwise.

Fifth, as alluded to above, some argue that this amendment would unduly limit the ability of citizens who have been wronged by the State to seek full redress. It must be recalled that the State already enjoys sovereign immunity from suits for damages. The amendment in question makes it very clear that under circumstances where the legislature has acted to waive this

immunity, as it has done under the Kansas Tort Claims Act, this amendment would not preclude damage judgments. No violence is done to separation of powers here because the Court is acting pursuant to a specific legislative grant of authority. In short, in any case seeking redress for past damages resulting from State action, this amendment would have no impact whatsoever on the current state of the law. As such the argument in this regard is vastly overstated by many of the amendments opponents.

The only "change", and this is only a change because of the Court's expansive interpretation of its remedy power in *Montoy*, would theoretically involve cases where the Court is not seeking to remedy a past wrong, but is instead attempting to direct future legislative conduct. And here I would again contend that for a court to act in such a fashion is inconsistent with the role of the judiciary. Courts routinely judge the constitutionality of past legislation. However, that is as far as the judicial power extends: courts lack the authority to compel a co-equal branch of government to pass specific statutes in the future. In other words, courts can create a void in the law by striking down particular statutes; but they cannot seize the reins of legislative power and attempt to fill that void. That is why the Supreme Court of the United States has never ordered Congress to pass a law. Put less technically, the amendment in question changes nothing of the law rightly understood. It merely restores the proper balance between the legislative and judicial branches.

Finally, some have argued that passing this constitutional amendment is unwise in that it would be unduly provocative to the Court. I would simply note that many of the people who have advanced this argument were also claiming that they would be very surprised if the Kansas Supreme Court would ever order a dramatic remedy such as school closer. We all saw that the Court, via its July 2, 2005 show cause order, is in fact very ready to order the most dramatic measures possible in order to bully the legislature into complying with its wishes. Acting now to defend legislative prerogative is not an act of provocation, it is an act in defense of the right of the people to retain authority over the taxing and spending power of the State via their elected representatives.

But under our State Constitution, unlike many other states, the people cannot act directly to amend the constitution and protect their rights. While the people are sovereign, they can only speak in their constitutional voice as electors if we allow them to do so by presenting a constitutional amendment to them for consideration. This amendment would provide the people that opportunity to exercise their voice and to reestablish the proper bounds of judicial authority as understood from the earliest days of our nation.

Allow me to conclude by saying that, all this having been said, it is comforting to remember that in our system of government it is the people, not the legislature or the courts who are ultimately sovereign. And it is with this in mind I believe that the wisest course for the legislature is to take the high road in this dispute, remembering that despite all appearances to the contrary the path of principle is indeed the safer path.

As such I believe our legislature must work within our constitutional framework by presenting to the people a constitutional amendment to reign in the judicial excess and restore the basic principles of representative democracy.

By this method a constitutional crisis can be avoided, balance can be restored among the branches of government, and we can look back to the sacrifices of our forefathers with a clear conscience saying we too have done our part to defend the principle of representative democracy for which so many have sacrificed so much.

No. 04-92032-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

Ryan Montoy, et al.
Plaintiffs /Appellees

vs.

The State of Kansas, et al.
Defendants /Appellants

BRIEF OF *AMICUS CURIAE* LEGISLATIVE COORDINATING COUNCIL

Appeal from the District Court of Shawnee County
Honorable Terry L. Bullock, Judge
District Court Case No. 99 C 1738

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ARGUMENTS AND AUTHORITIES.

I. The Kansas Legislature Has Made "suitable provision for finance of the educational interests of the state."

In less than two years, the Kansas Legislature has allocated more than $484 million of new, *annual base* money for the Kansas public school system, grades K through 12, with a promise of another $300 million or so the in the next two years. Combining the funding for K - 12 with that provided for higher education, total state expenditure on education for the 2007 fiscal year will be almost $3.6 billion. This is an extraordinary commitment for a state that is rich neither in resources nor in population.

The Kansas Legislature, the Governor of Kansas, and the Attorney General all agree that these recent massive increases in school funding, added to pre-existing state funding for education, satisfy the requirements of Article VI of the Kansas Constitution to "make suitable provision for finance of the educational interests of the state." Respect is due their collective judgment, as they are the elected representatives of the people of Kansas.

Furthermore, "suitable provision for finance" has no judicially discoverable meaning. To this day, the Court has not provided a *legal* definition of this constitutional provision, and understandably so. The vague, hortatory language of Article VI, § 6, simply does not lend itself to judicially discoverable and manageable standards. Rather, the decisions to be made in the area of financing public education are inherently and quintessentially legislative, political choices. *See U.S.D. No. 229 v. State of Kansas*, 256 Kan. 232, 265, 885 P.2d 1170 (1994) ("The funding of public education is a complex, constantly evolving

process. * * * Rules have to be made and lines drawn in providing 'suitable financing.' The drawing of these lines lies at the very heart of the legislative process and the compromises inherent in the process.").

With all due respect to the Court and its constitutional role, the Court should declare that the elected public officials of Kansas are in compliance with our state constitutional requirements regarding the finance of education (indeed, they are in substantial compliance with the Court's specific suggestions), and dismiss this suit.

II. The Article VI, § 6 "make suitable provision for finance" Language Does Not Create A Judicially Enforceable Standard.

A. Article VI, § 6 Provides No Judicially Discoverable Or Manageable Standards For Its Implementation.

1. The Constitutional Provisions Alone Provide No Standard.

Article VI, § 1 of the Kansas Constitution provides:

> The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.

Article VI, § 6(b) provides that "[t]he legislature shall make suitable provision for finance of the educational interests of the state."

The meaning of these two provisions is not evident, and the provisions certainly can be read as hortatory – as is true of many state constitutional provisions – with respect to the legislature supporting public education. Nothing in Article VI suggests that there is an *individual* right to any particular education, nor does anything in the Kansas Bill of Rights recognize such an individual right.

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Instead, Article VI places a general duty on the Legislature as a branch of state government; it gives no citizen standing to assert an individual right or entitlement. Indeed, Article VI, § 6(b) speaks of "the educational interests *of the state*" (emphasis added), not individual rights. The Legislature's constitutional duty to provide public education is owed to the state generally, like the "public duty" of the police to protect citizens as a whole. It is not a duty that is enforceable in lawsuits by individual students or school districts.

The single word that bears all of the weight in this case is "suitable." Dictionary definitions of "suitable" are singularly unhelpful, because the word itself has no definite meaning. For example, the American Heritage College Dictionary (3d ed. 1997) defines "suitable", an adjective, as "[a]ppropriate to a purpose or an occasion." That's it. No alternative definitions, nothing more precise. What is "suitable" is completely a matter of context, depending on what assumptions are made and what value (or policy) judgments are applied.

Thus, "suitable" is an extremely vague word, an adjective which inherently gives unbounded discretion to the person or entity charged with making a judgment based on "suitability." Thus, the "suitable provision for finance" language in fact gives the Legislature and other elected public officials great discretion in implementing and satisfying it:

> "Suitable" is one of those adjectives which leaves its content to be determined entirely by context. As my noble and learned friend Lord Scott of Foscote put it in argument, **a suitable hat for Royal Ascot is very different from a suitable hat for the Banbury cattle market.** * * * But the breadth of the concept of suitability is what determines the breadth of the authority's discretion.

Quintavalle v. Human Fertilisation and Embryology Authority, Lord Hoffman (2005) U.K.H.L. 28.

2. The Court Has Not Articulated A Definition Of "Suitable".

Prior to this litigation, the Court recognized the difficulties inherent in interpreting Article VI and properly adopted a deferential standard of review. In *U.S.D. No. 229 v. State of Kansas*, 256 Kan. 232, 257, 885 P.2d 1170, 1185 (1994), the Court quoted the trial court, stating: "Suitability does not mandate excellence or high quality. In fact, suitability does not imply any objective, quantifiable education standard against which schools can be measured by a court. Rather, value judgments must be made . . . ."

Although the Court recently adopted an aggressive review of the Legislature's efforts regarding school finance, it still has not articulated a definition of "suitable". Nor has the Court offered the parties any clear idea of the "suitable" standards the Court has discovered hidden in Article VI, § 6. *See Montoy v. State of Kansas*, ___ Kan. ___, 773, 120 P.3d 306, 309 (2005) ("The concept of 'suitable provision for finance' encompasses many aspects.").

Instead, the Court has focused exclusively on *factual* issues. Particularly, the Court has emphasized (1) "equitable" funding and (2) "actual costs." *See Montoy II*, ___ Kan. ___, ___, 120 P.3d 306, 310 ("The *equity* with which the funds are distributed and the *actual costs* of education . . . are critical factors for the legislature to consider in achieving a suitable formula for financing education.") (emphasis added); *Montoy v. State of Kansas*, 279 Kan. 817, 819, 112 P.3d 923, 926 (2005) (same; quoting *Montoy II*).

Lawyers, parties, legislators, the Governor, and interested Kansans search in vain for any *legal* definition of "suitable." To this day, the Court has not produced one. That said, the reason is understandable: "suitable provision for finance" has no judicially discoverable meaning, if any meaning at all. The choices in interpreting such a broad constitutional provision are inherently policy laden, and thus quintessentially legislative, political decisions.

Article VI, § 6 does not lend itself to judicial definition. That fact alone provides compelling reason for the Court to decline the role of special master of the Kansas Legislature and the Kansas public school system.

B. The Court's Recent Focus On "Equitable" Funding Is Equal Protection Analysis.

1. The Court Unanimously Rejected State And Federal Equal Protection Claims In Its January 3, 2005 Opinion.

The Court's unanimous *per curiam* opinion issued on January 3, 2005, rejected the trial court's conclusions that Kansas school finance laws violated the Equal Protection Clauses of the United States and Kansas Constitutions. *See Montoy II*, 278 Kan. 769, 771, 120 P.3d 306, 308 ("We reverse the district court's holding that [the law] is a violation of equal protection. * * * We conclude that all of the funding differentials . . . are rationally related to a legitimate legislative purpose. Thus, the [law] does not violate the Equal Protection Clause of the Kansas or United States Constitutions."); *id.* (also rejecting the argument that the law was unconstitutional because of a "disparate impact" on minority and perhaps other students, concluding that "[n]o discriminatory purpose was shown by the plaintiffs."). Rightly so, because there are no "suspect classifications" in

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the Kansas laws, no Bill of Rights guarantees at stake, and no evidence of discriminatory purpose by the Legislature or any Kansas elected officials.

2. The Court's "Suitability" Opinions Have Improperly Focused On "Equitable" Funding.

Despite the Court's stated rejection of equal protection claims, the Court recently has focused on "equitable" funding of school districts and on funding for at-risk, bilingual, and special education students as factors of purported constitutional magnitude. *See Montoy II*, ___ Kan. at ___, 120 P.2d at 310; *Montoy III*, 279 Kan. at 831-33, 112 P.3d 923, 933-34 (2005). Yet those concerns are actually equal protection arguments.

In effect, the Court is accepting through the back door arguments that it purported to reject at the front door. Again, this is understandable, because the "suitable provision for finance" language has no determinable *legal* meaning. That acknowledged, the Court should not simply employ equal protection analysis in the guise of a very different state constitutional provision. Indeed, there is no indication whatsoever, in the Article VI, § 6 language, in the case law, or in Kansas history, that Article VI incorporates equal protection principles (which are addressed in § 1 of the Kansas Bill of Rights).

3. Whether Or Not Education Is A Fundamental Right Does Not Alter The Analysis In This Case.

In September, 2005, one member of the Court issued an opinion concurring in the Court's January 3, 2005, opinion and expressing the view that education is a fundamental right under the Kansas Constitution. Though a concurring opinion issued nine months after the decision in which it concurs is

unusual, even were a majority of the Court to adopt the view that education is a fundamental right, such a conclusion would not alter the analysis in this case.

First, the concurring opinion itself recognizes that there is no fundamental right to any particular level of education funding. *Montoy II*, ___ Kan. at ___, 120 P.3d at 315 (rational basis review remains the standard for "statutes providing for education finance in Kansas" "as opposed to outright denial of the right to an education"). Thus, even adopting the concurring opinion's perspective, judicial review of school funding is unaffected by the suggestion that education should be a fundamental right.

Second, the concurring opinion places substantial weight on structural accidents (that Education is the topic of Article VI of the Constitution, rather than a later article, supposedly demonstrating that education was important above almost all other interests), while ignoring the lack of any express provision for an *individual* right to education in the Kansas Bill of Rights. It is no accident (and certainly ironic) that any individual "right" to education has to be found in Article VI, which addresses the responsibilities of *government institutions*, rather than in the Bill of Rights, which identifies the *individual* rights of Kansans. Not surprisingly, *no* Kansas case law supports this aspect of the concurring opinion.

Lastly, declaring some activity a "fundamental" right does not alone tell the Court much, if anything, about the scope of that right. As the U.S. Supreme Court's cases make clear, "fundamental" does not mean "absolute." For example, the U.S. Supreme Court has declared the "right to marry" to be "fundamental". *See, e.g., Zablocki v. Redhail,* 434 U.S. 374 (1978); *Loving v. Virginia,* 388 U.S. 1 (1967). However, the Court upheld a prohibition on

polygamy in *Reynolds v. United States,* 98 U.S. 145 (1878), and it has given the States wide latitude to regulate marriage.

For that reason, all or virtually all states prohibit polygamy, incestuous marriages, marriage by persons under a certain age, and same sex marriage. There are licensing requirements, officiant requirements, waiting periods, and state-imposed fees for marriage. All of these regulations traditionally have been deemed constitutional, even though each and every one of them intrudes – often significantly so – on the "fundamental" right to marry.

The parallel here is that even making the gargantuan leaps of faith that Article VI bestows a fundamental right to education on *individual* Kansans and that such a right applies to the *funding* of public education, it would not be an "absolute" right. The mere assertion of such a right would not automatically trigger rigorous judicial review, just as numerous restrictions on marriage do not.

C. The Concept Of "Actual Cost" Is Not A *Constitutional* Standard.

1. Article VI, § 6 Nowhere Mentions "Actual Cost".

The Court has directed the Legislature to take into account the "actual cost" of education. *See, e.g., Montoy II,* ___ Kan. at ___, 120 P.2d at 310. However, nothing in Article VI, § 6 mentions the concept of "actual cost." As both a practical and policy matter, the Legislature necessarily will consider costs in determining school funding, but it will and must consider many other factors as well. The Court has failed to explain or to justify why "suitable" means "actual cost", whatever "actual cost" itself means.

2. "Actual Cost" Is A *Factual* Issue, Not A *Legal* One, And There Is No Judicial Benchmark For Its Determination.

There are at least two serious flaws in using "actual cost" as a constitutional standard. First, "actual cost" assumes a judicial benchmark by which the concept can be measured. However, there is no such benchmark in the context of operating a "constitutionally adequate" statewide public school system. There is no objective or consensus way to determine precisely what a "constitutionally adequate" statewide school system must accomplish. The Court has attempted to finesse this problem thus far, by relying on legislatively adopted state standards regarding educational outputs. But the standards can be met in a variety of ways, and the Legislature can change the standards, meaning that such standards cannot be constitutional requirements at all. Moreover, reliance on the legislative standards merely proves that school finance decisions are the Legislature's prerogative.

The "actual cost" approach begs the question of what exactly is to be provided. What is the actual cost of a "suitable" prison system, a "suitable" Department of Wildlife and Parks, or a "suitable" state highway system? There are myriad legislative decisions that go into such determinations; the amount of dollars is only one factor. More money may help governmental entities accomplish more and serve more people, but the "actual cost" is not a constitutional benchmark against which elected public officials may measure the vast array of cost and expenditure options for schools.

3. Using "Actual Cost" As A Constitutional Standard Is Tantamount To Making The Court The Master Of Numerous Elected Officials.

Because "actual cost" requires *annual* factual determinations, adopting "actual cost" as a constitutional standard would make the Court the permanent overseer of school finance in Kansas. Such an approach is ill-advised and incapable of being sustained over the long term. Indeed, several other state supreme courts that have aggressively involved themselves in the legislative minutiae of school finance matters (acting as the special masters of their state's public schools) already have discovered that once a state supreme court begins participating in school finance matters on the basis of vague state constitutional provisions with no ascertainable legal meaning, there is no end game. There is no logical stopping point for the court's participation in the legislative process and all of the policy choices that the process entails.

The Rhode Island Supreme Court has declined to become mired in a "morass comparable to the decades-long struggle of the Supreme Court of New Jersey", citing the New Jersey experience as a "chilling example of the thickets that can entrap a court that takes on the duties of a Legislature." *City of Pawtucket v. Sundlum*, 662 A.2d 40, 59 (R.I. 1995). Last year, the Massachusetts Supreme Court also decided "ongoing jurisdiction shall be terminated." *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1137(Mass. 2005). These Courts are not abdicating their duties; they are acknowledging that "the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and

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administrative discretion." *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 29 (1996).

School finance issues are indeed complex, multi-faceted and policy-oriented; decisions are driven by value-laden judgments. The choices are inherently political, and thus legislative in nature – not judicial. The Kansas Supreme Court should wade no deeper into these legislative matters which are the domain of elected public officials. The Legislature has acted responsibly, and the Court should terminate its participation in this quintessential political process.

III. Judicial Review Under Article VI, § 6 Must Be Highly Deferential.

A. School Finance Decisions Are Quintessentially "Legislative".

As the Court recognized in rejecting the plaintiffs' equal protection challenges, Kansas school finance laws are *rational* and serve *legitimate* government purposes. Absent proof of some discriminatory purpose or intent behind the laws, or some other reason to invoke more rigorous judicial scrutiny, the rejection of the equal protection challenges should be the end of the Court's review. Any more intrusive role simply substitutes the judgment of six unelected justices for the collective judgment, study and political compromise of our Legislature and the Governor, who answer directly to the people of Kansas for their votes and official actions.

The Legislature has been responsive to school finance concerns. This past session, the Legislature enacted Senate Bill No. 549, which will provide $466.25 million in new, *annual base* funding to Kansas schools over the next three years, including $194.5 million for the coming year. This is in addition to

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the $290 million in new, *annual base* funding the Legislature appropriated last summer.

Further, the Legislature carefully considered and responded to the Legislative PostAudit study completed earlier this year. For example, the Legislature specifically and significantly increased funding for the following: (1) all school districts receive increases in the Base State Aid Per Pupil for the next three years; (2) the at-risk student weighting factor increases from 19.3 to 45.6 over the next three years; (3) there is increased weighting for districts having high percentages of students receiving free meals; (4) high-enrollment weighting is changed to benefit larger school districts; and (5) special education excess costs are increased. All of these provisions address aspects of the Legislative Post Audit Study, and all demonstrate legitimate efforts to "make suitable provision for finance" of the Kansas public schools.

Importantly, the Legislature this year again has done what legislatures have done for centuries. Rather than criticize the Legislature for acting on the basis of "former spending levels and political compromise," the Court should recognize and respect the realities of democracy, warts and all. *Montoy II*, ___ Kan. at ___, 120 P.3d at 310. Our Kansas legislators are dedicated public servants, often making significant personal and business sacrifices to serve Kansas citizens. They do their utmost to serve their constituents and the State. The Legislature should be commended, not condemned, for its efforts the past two years. Its ultimate decisions are deserving of the Court's respect, especially in light of political realities, limited state resources, and competing policies.

If the Court becomes the permanent overseer of the Legislature on school finance matters, the Court veers toward the shoals of Article IV, § 4, of the United States Constitution. This provision, known as the Guarantee Clause, provides that "[t]he United States shall guarantee to every State in This Union a Republican Form of Government." The Court itself has recognized that Guarantee Clause claims are justiciable. *Van Sickle v. Shanahan,* 212 Kan. 426, 511 P.2d 223 (1973).

It may take extreme facts to justify a federal court in finding that a state supreme court has violated the Guarantee Clause. *See, e.g., Largess v. Supreme Judicial Court For The State of Massachusetts,* 373 F.3d 219, 225 (1st Cir. 2004) ("The Guarantee Clause might provide an exception to that rule of deference [of federal courts to state courts on questions of state law] in extreme cases, such as where the members of a state's highest court declared the state to be a monarchy and themselves its regents."). But how much better it would be for Kansas that such a claim never even arise.

Senate Bill No. 549 -- approved by both houses of the Legislature and signed by the Governor -- adds $194.5 million in new, annual base money to last year's $290 million, and promises another $300 million or so in the next two years. The Court may not view this legislation as "ideal" but the Court must acknowledge that the Legislature has made "suitable" provision for funding the educational interests of Kansas. Indeed, Senate Bill No. 549 is far preferable to the Court closing the public schools by declaring the statute unconstitutional and prohibiting any funds from being spent. Were the Court to adopt such a drastic and unprecedented remedy, the Court would cause immeasurable harm to the

State of Kansas. Senate Bill No. 549 serves the children of Kansas far better than would a court-ordered shut down of the schools.

B. The Principle Of Judicial Review Is Fundamental, But Its Exercise Is A Matter Of Judgment, Not Constitutional Compulsion.

In *Montoy III* (the June 3, 2005 opinion), the Court opined that it is compelled to review the constitutionality of all legislation. 112 P.3d at 930 ("The judiciary's sworn duty includes judicial review of legislation for constitutional infirmity. We are not at liberty to abdicate our own constitutional duty."). In doing so, the Court cited the venerable precedent of *Marbury v. Madison*, 5 U.S. 137 (1803). With all due respect, the Court perhaps overstated and certainly oversimplified its constitutional role.

Marbury does not say that the courts are to be the final word on *every* issue or question that may arise in our society, not even if plaintiffs find a way to bring the issue to the courts. A host of constitutional doctrines in fact are designed to keep the courts out of some decisions, including such well-established ones as the rule against advisory opinions, standing requirements, ripeness, mootness, and the political question doctrines. Nor does *Marbury* hold that courts pay no *deference* or *respect* to co-equal branches of government, even when interpreting a constitution. Nor does *Marbury* hold that there are *never* potential constitutional questions which are the prerogative of the chief executive or the legislature.

Perhaps most importantly, *Marbury* does not say that courts are always *correct* even when they do answer constitutional questions, just that they are *often* the final word. As Justice Jackson famously put it, "[w]e are not final

because we are infallible, but we are infallible only because we are final." *Brown v. Allen,* 344 U.S. 443, 540 (1953) (concurring opinion).

Public respect for judicial decisions is earned. It is earned by the competence, diligence, and restraint of judges. Judicial decisions that fail to exhibit those qualities undermine public confidence in the courts as the interpreters, rather than the creators, of the law. Throughout American history, the most grievous wounds that courts have suffered were self-inflicted.

CONCLUSION

For the preceding reasons, as well as those that the Attorney General has presented, and in accordance with the opinion and wishes of the Governor of Kansas, the Court should find Senate Bill No. 549 to be constitutional, and this action should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of *Amicus Curiae* Legislative Coordinating Council were mailed via U.S. mail, postage prepaid, on the 2nd day of June, 2006, to:

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AMERICANS FOR PROSPERITY
KANSAS

February 14, 2011

House Concurrent Resolution 5006
House Judiciary Committee

Mr. Chairman and members of the committee,

I am proud to provide testimony today, in representing the more than 40,000 members of Americans for Prosperity-Kansas.

AFP Kansas supports HCR 5006 which amends section 24 of article 2 of the Kansas Constitution, relating to appropriations.

HCR 5006 at its' heart, is a separation of powers issue. The purpose of the proposed Constitutional Amendment is to further distinguish the roles of the executive, judicial, and legislative branches of government from one another. This is in order to prevent an abuse of power by any one particular branch.

The proposed Constitutional Amendment would clarify that the judicial and executive branches do not have authority to appropriate or redirect funds. It is the legislative branch that has the sole power to make laws and in turn, to appropriate. The power to appropriate acts to intensify the checks made by the other two branches. The fact that the legislature is divided into two chambers, addresses any concerns one may have related to checks and balances issues.

It has been six years since the Kansas Supreme Court ruled on the Montoy case. Since that time many elected officials have expressed concern over the judicial branch ordering the legislative branch to in essence, appropriate taxpayer dollars. During this time the people of Kansas have been limited in how they could act upon their approval or disapproval of the Supreme Court ordering an appropriation of funds. By placing a proposed Constitutional Amendment before them, the legislature can provide its' constituents the opportunity to directly take a stand on this issue.

Thank you for the opportunity to provide testimony in support of HCR 5006.

Derrick Sontag
State Director
Americans For Prosperity-Kansas

House Judiciary
Date 2-14-11
Attachment # 4

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
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Testimony before the
House Judiciary Committee
on
HCR 5006

by
Mark Tallman, Associate Executive Director for Advocacy
Kansas Association of School Boards

February 14, 2011

Mr. Chairman, Members of the Committee:

The Kansas Association of School Boards determines its public policy positions through a Delegate Assembly representing member school boards. The Delegate Assembly has adopted the following position:

> KASB supports the role of an independent judiciary in enforcing constitutional provisions. We oppose either changing the selection process for judges or limiting the ability of the courts to enforce those provisions, which would weaken the traditional separation of powers in Kansas.

On this basis, we oppose **HCR 5006**. The people of Kansas, through the Education Article of their Constitution, have directed the Legislature to provide for a system of public schools and educational institutions, and to make suitable provision for finance of the education interests of the state. The people should have the ability to seek to enforce those constitutional provisions through the judicial system.

By removing the ability of the courts to direct the Legislature to make or limit appropriations, the power to enforce constitutional provisions is reduced. Therefore, we oppose this concurrent resolution.

Thank you for your consideration.

House Judiciary
Date 2-14-11
Attachment # 5

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House Judiciary Committee
HB 2196
Assistant Attorney General Kyle Smith
February 14, 2011

Mr. Chair and members of the committee, thank you for allowing me to provide testimony on behalf of Attorney General Derek Schmidt in support of HB 2196. I appear today on behalf of Assistant Attorney General Christine Ladner, who is responsible for prosecution of sexually violent predators (SVPs) in the office of Attorney General Schmidt.

HB 2196 would save costs and streamline presentation of evidence by amending the rules of evidence in SVP cases to mirror the Federal Rules of Evidence (FRE). Expert testimony of psychologists are at the heart of SVP cases. If the Respondent objects to a psychologist's testimony as hearsay, presentation of the expert opinion soon becomes unwieldy depending upon the source of the information in the prior records. In Kansas, "experts' opinions based upon hearsay are not admissible in any court proceedings." *In re Care & Treatment of Foster*, 280 Kan. 845, Syl. ¶ 9 (2006).

Existing law is a problem because the hearsay objection makes foundation requirements for expert opinion in SVP cases extraordinary foundation. If we must subpoena records custodians in order to satisfy foundation requirements, cost, travel and efficiency are issues. Even more problematic, if we have to subpoena prior victims (particularly those who were children at the time of the prior molestations) or law enforcement officials who may no longer be available, the burden of having these declarants available is enormous. It seems a disservice to victims of violent sexual assaults, whose cases were long ago disposed of, to have to testify about the same facts again to establish SVP status on the same perpetrator. For those predators who have lengthy criminal histories, it surely is not the legislative intent behind the SVPA for predators to avoid commitment because they have outlived their victims.

In litigating SVP cases, the State relies heavily upon psychological experts. Before an inmate is released from custody for a sexually violent offense, the inmate is interviewed and evaluated by a psychologist employed by the Department of Corrections (DOC). The psychologist prepares a Clinical Services Report (CSR). The CSR includes the diagnosis, progress in Sex Offender Treatment while in DOC and risk assessment. These psychologists rely on DOC records and other treatment records of the inmate in making their assessments.

If the State files a Petition pursuant to the KSVPA and a court finds probable cause that the inmate meets the criteria for a Sexually Violent Predator, the inmate is further evaluated by psychologists at Larned State Security Hospital (LSSH). If the LSSH evaluation determines that the respondent meets the criteria for SVP status, we proceed to trial. These psychologists rely on volumes of prior treatment records.

K.S.A. 60-456(b) controls the admission of testimony of expert opinion. The testimony must be: (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of special knowledge, skill, experience or training possessed by the witness.

This proposal does not change K.S.A. 60-456(b), but amends the rule only in SVP cases to conform with the Federal Rules of Evidence on the admission of expert opinion.

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Justice Beier in *In Re Care and Treatment of Colt* recognized that FRE 703 is more in line with the practice of experts.

The rationale of the Federal Rule is that judicial practice should be brought in line with the practice of experts themselves when not in court, who, in the case of physicians, may make life and death decisions on the basis of hearsay statements.

Under the federal rule, if it is the customary practice in the expert's specialty to consider reports from nontestifying third parties in formulating an opinion, the expert's testimony may be based on such reports. Under such circumstances, however, evidence of the report is not admitted as substantive proof of the report's truth but for the limited purpose of showing the basis of the expert's opinion.

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Testimony in Support of House Bill 2196
Presented to the House Judiciary Committee
by Attorney General Derek Schmidt
February 14, 2011

Mr. Chairman, members of the committee, thank you for conducting this hearing this afternoon.

House Bill 2196 is one of four bills I have proposed this year to strengthen our state's efforts against the exploitation of children. The public policy purpose of House Bill 2196 is to reduce the number of times that a child victim must testify about the crimes committed against him or her.

House Bill 2196 would pursue this purpose by allowing expert witness testimony during sexually violent predator proceedings to be based upon a review of the record and professional reports. The effect would be to reduce the number of times that the child victim must take the stand.

This bill contains the same language of 2010 Senate Bill 455. That measure passed the Senate last year 40 to 0. It came late in the session and was not acted upon in the House of Representatives.

This policy proposal was first brought to the legislature by Assistant Attorney General Christine Ladner, who handles many child sex crimes cases for my office. AAG Ladner feels strongly that adoption of this measure would be beneficial to child victims. Unfortunately, she is in trial today in Cherokee County and is not able to appear and testify in person.

Thank you for your consideration. I would stand for questions.

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