Docket No. 10-3320

In the

United States Court of Appeals

For the

Tenth Circuit

ROBERT DOOL, JULIE BROWN,
DONALD D. ROSENOW and THOMAS C. SCHERMULY,

Plaintiffs-Appellants,

v.

ANNE E. BURKE, KERRY E. McQUEEN, PATRICIA E. RILEY,
MATTHEW D. KEENAN, JAY F. FOWLER and CAROL GILLIAM GREEN,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the District of Kansas (Wichita), No. 6:10-CV-01286-MLB-KMH · Honorable Monti L. Belot (U.S. District Judge)

BRIEF OF APPELLANTS

Oral Argument Requested

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26, the following trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Constitutional Provisions

Other Authorities

Jurisdictional Statement

This case involves a challenge to the constitutionality of Article III, Section 5(e) of the Kansas Constitution, and Sections 20-119 through 20-123 of the Kansas Statutes. The action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the Fourteenth Amendment to the Constitution of the United States. The District Court's subject matter jurisdiction in this case rests on 28 U.S.C. § 1331, because this is a civil action alleging that the challenged Kansas constitutional section and statutes violate the Fourteenth Amendment of the U.S. Constitution. This Court has jurisdiction over this federal question under 28 U.S.C. § 1291 to review the District Court's final order entered on November 3, 2010, granting the motion to dismiss of the Chairman and Attorney Members of the Kansas Supreme Court Nominating Commission and the Clerk of the Kansas Supreme Court (collectively "the State") and denying the motion for summary judgment of Robert Dool, Julie Brown, Donald D. Rosenow, and Thomas C. Schermuly (collectively "the Voters") as moot, thereby disposing of all claims in this action. (ER 6). The Voters appealed as of right of that judgment, Fed. R. App. P. 4, filing their notice of appeal on December 3, 2010, Fed. R. App. P. 4(a)(2). (ER 6). The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is founded upon 28 U.S.C. § 1343(a). The

jurisdiction over the claims arising under the Fourteenth Amendment is founded upon 28 U.S.C. §§ 1331 and 1343(a). All claims arise under both 42 U.S.C. § 1983 and the Fourteenth Amendment.

Statement of the Issues

I. Whether the District Court Erred in Finding that the Franchise Restrictions on the Elections of the Chairman and Attorney Members of the Kansas Supreme Court Nominating Commission Do Not Violate Appellants' Rights to Equal Protection in light of *Hellebust v. Brownback.*

Statement of the Case

On August 25, 2010, Robert Dool, Julie Brown, Donald D. Rosenow, and Thomas C. Schermuly filed their Verified Complaint in the United States District Court for the District of Kansas alleging that their constitutional rights to equal protection are violated by Kansas Constitution Article III, Section 5(e) and as implemented by Kansas Statutes Sections 20-119 through 20-123. (ER 4, 22). The Voters filed a Motion for Temporary Restraining Order and Preliminary Injunction on August 26, 2010, requesting that the effect of these provisions be enjoined. The State filed a response to the Voters' motion for preliminary relief on September 8, 2010, and the District Court held a hearing on that motion on September 10, 2010. (ER 5). The District Court issued an order on September 14, 2010, denying any preliminary relief. (ER 5). This order has not been appealed. A motion to dismiss

was filed by the State on September 19, 2010, followed by a motion for summary judgment by the Voters on September 23, 2010. (ER 6). No further hearings were held. On November 3, 2010, the District Court issued an order and opinion granting the State's motion to dismiss for failure to state a claim and denying the Voters' motion for summary judgment as moot. (ER 6, 29, 39). The Voters filed their notice of appeal on December 3, 2010. (ER 6, 42-43).

Statement of Facts

This case involves the election of certain officials on the Kansas Supreme Court Nominating Commission ("Commission"). The Commission was established by the Kansas Constitution "to nominate and submit to the governor the names of persons for appointment to fill vacancies in the office of any justice of the supreme court." Kan. Const. art. III, § 5(d). When a vacancy occurs on the Kansas Supreme Court, the governor must fill it by appointing one of three persons nominated by the Commission. Kan. Const. art. III, § 5(a); Kan. Stat. § 20-132. If the governor refuses to appoint one of the Commission's nominees, the chief justice of the Kansas Supreme Court must make the nomination. Kan. Const. art. III, § 5(b). The nominations made by the Commission, and the appointments therefrom, are not subject to any kind of legislative confirmation. The Commission also makes nominations for vacancies on the Kansas Court of Appeals in the same way. Kan. Stat. § 30-3004. One of the Commission's nominees will invariably

become a justice or judge. Thus, the Commission determines the composition of the Kansas judiciary.

The Commission has nine members and is composed as follows:

> One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.

Kan. Const. art. III, § 5(e). The chairman is elected to a four year term. Kan. Stat. §§ 20-119. The other attorney members are elected to staggered four year terms. Kan. Stat. § 20-120. The elections are administered by the Clerk of the Kansas Supreme Court. *Id.* Only members of the bar of Kansas are permitted to vote in these elections. *Id.* None of these elections are subject to any kind of legislative or executive confirmation.

The Voters are all Kansas citizens registered to vote in Kansas, residing in counties across the state. (ER 10). They are excluded from participating in the elections of the attorney members of the Commission because they are not members of the bar. (ER 13, 17). The next election will take place on or before May 1, 2011, for the member who's term expires on June 30, 2011. Kan. Stat. § 20-120. (ER 11-14). The next chairman election will take place in 2013. (ER 11).

A vacancy occurred on the Kansas Supreme Court on August 3, 2010, when Chief Justice Robert E. Davis retired from the bench and passed away on August 4, 2010. (ER 13). The Commission accepted applications until September 1, 2010, conducted interviews on September 27-28, 2010, and submitted three nominations to the governor on September 28, 2010. (ER 13). On November 1, 2010, the governor made his appointment from the submitted nominations.

The constitutionality of the so-called merit-selection system for selecting judges is absolutely not at issue in this case. Nothing in Appellants' Equal Protection challenge here would result in an overhaul to Kansas's system for selecting judges or necessitate the election of judges. Appellants do not object to the nomination of their judges through a commission or the composition of the present Commission. They do not object to any requirement that a certain number of Commissioners be attorneys. Appellants simply maintain that they, as qualified Kansas voters, cannot be excluded from the elections for the public officials who nominate their judges. In the end, Kansas would most certainly still have a merit selection system if Plaintiffs are granted the relief they seek. *See* Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 492 (2009).

Summary of the Argument

This Court should reverse the District Court's finding that the franchise restrictions on the Commission elections are constitutional. (ER 32). Kansas holds elections for public officials and restricts the franchise in those elections based on occupation. The Supreme Court has established that "any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." *Hill v. Stone*, 421 U.S. 289, 297 (1975). This scrutiny is required by the Equal Protection Clause here because Kansas is holding state-wide and congressional district elections and "some resident citizens are permitted to participate and some are not." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969); *City of Herriman v. Bell*, 590 F.3d 1176, 1185-86 (10th Cir. 2010) ("When a state law discriminates among eligible voters within the *same* electoral district, strict scrutiny applies, and compelling government interests must justify restrictions of the franchise.").

Kansas discriminates among eligible voters in the elections of the members of the Commission based upon occupation and payment of fees. Kan. Stat. §§ 20-119, 20-120, 20-122; *see* Kan. Stat. § 7-103. Specifically, in order to vote in these elections, a resident voter must obtain a degree from an accredited law school, Kan. Sup. Ct. R. 706, gain character and fitness approval from the Kansas Board

of Law Examiners, Kan. Sup. Ct. R. 707, pay admission fees and ongoing dues, Kan. Sup. Ct. R. 704, and pass bar and ethics examinations, Kan. Sup. Ct. R. 708, 709. But the U.S. Supreme Court has definitively established that discrimination among voters based on occupation or payment of fees does not serve a compelling state interest and violates Equal Protection. *Carrington v. Rash*, 380 U.S. 89, 96 (1965) ("There is no indication that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.") (quoting *Gray v. Sanders*, 372 U.S. 368, 380 (1963)); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) ("We think the same must be true of requirements of wealth or affluence or payment of a fee."). Therefore, the exclusion of the Voters from the franchise in the elections of the members of the Commission violates their Equal Protection rights.

There is only a very narrow and rarely applied exception to this principal. *City of Herriman*, 590 F.3d at 1186 n.6. Since it cannot withstand strict scrutiny, the only way the voter qualification at issue here can be constitutional is if the State can show that the election is one of special interest according to the test formulated in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973) and *Ball v. James*, 451 U.S. 355 (1981). This Court has discussed this exception extensively in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994).

In *Hellebust*, this Court held that the selection of the Kansas Board of Agriculture was of general interest and so could not be limited to the members of agricultural groups. *Id.* at 1334-35. Applying *Salyer* and *Ball*, this Court focused on two things. First, whether the Board's activities "materially affect residents of Kansas who are not represented by the present method of Board selection," *id.* at 1334, and second, whether the Board's powers are "part of the normal functions of state government" or "core governmental powers," *id.* at 1335.

Hellebust is indistinguishable from this case and so this case should have the same result. First, all Kansas voters are materially affected by and have a substantial interest in the activities of the Kansas Supreme Court Nominating Commission, namely, the nomination of Kansas's justices and judges. And second, the nomination of judicial officers is a traditional government function that is part of the normal functions of state government and a core governmental power. The District Court was in error when it held that the Commission satisfies the limited purpose exception and that this case is distinguishable from *Hellebust*.

Standard of Review

This Court reviews *de novo* a district court's disposition of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *Peterson v. Grisham*, 594 F.3d 723, 727 (10th Cir. 2010).

Argument

I. The Equal Protection Clause Prohibits Unjustified Discrimination in the Selection of Public Officials.

In a republic, all government power is derived from the people as a whole. The Federalist No. 39, at 209 (James Madison) (Clinton Rossiter ed., 1999). The powers exercised by each branch of the government, whether to make, execute, or interpret the law, must come from the people who are subject to that law. And these powers must be derived from the people as a whole, with no group of people excluded or favored. A natural outgrowth of this principle is the idea that all people are equal under the law.

This is the essence of self-government in a republic. "It is *essential* to such a government that it be derived from the great body of the society, and not from an inconsiderable proportion or a favored class of it . . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people." *Id.* In a government by the people, public officials cannot be selected by an exclusive group, but must be selected by the people as a whole. This includes judges. *Id.* at 210 ("Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves.").

The right to self-governance underlies the Supreme Court's jurisprudence regarding what the Equal Protection Clause of the Fourteenth Amendment requires in the selection of public officials. The right to vote, for example, derives from this right to self-governance. *Kramer*, 395 U.S. at 626. "Any unjustified discrimination in determining who may participate . . . in the selection of public officials undermines the legitimacy of representative government." *Id.* Having a specific class of people exclusively vote for certain public officials is contrary to this right.

A. The Equal Protection Clause Prohibits Franchise Restrictions in Elections of General Interest.

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This clause means that a state government may not make arbitrary and invidious distinctions among its citizens. *Avery v. Midland County*, 390 U.S. 474, 484 (1968). When a fundamental right is involved, such as the right to vote in an election, *see, e.g.*, *City of Herriman*, 590 F.3d at 1184, a state must meet a high standard to justify "[s]tatutes grant[ing] the right to vote to some bona fide residents of requisite age and citizenship and den[ying] the franchise to others," *Kramer*, 395 U.S. at 627. According to that standard, "in an election of general interest, restrictions on the franchise other than residence, age, and citizenship

must promote a compelling state interest in order to survive constitutional attack." *Hellebust*, 42 F.3d at 1333 (quoting *Hill*, 421 U.S. at 295)).

Kansas discriminates among eligible voters in the elections of the members of the Commission based upon occupation and payment of fees. Kan. Stat. §§ 20-119, 20-120, 20-122; *see* Kan. Stat. § 7-103. Specifically, in order to vote in these elections, a resident voter must obtain a degree from an accredited law school, Kan. Sup. Ct. R. 706, gain character and fitness approval from the Kansas Board of Law Examiners, Kan. Sup. Ct. R. 707, pay admission fees and ongoing dues, Kan. Sup. Ct. R. 704, and pass bar and ethics examinations, Kan. Sup. Ct. R. 708, 709. If these elections are of general interest, these voter eligibility requirements cannot be constitutional under the Equal Protection Clause.

Therefore, at bottom, the sole issue in this case is whether the elections of the chairman and attorney members of the Commission are of general interest. An election is of general interest unless the state can show that it meets the very narrow exception formulated in *Salyer* and *Ball* for elections of limited interest. *City of Herriman*, 590 F.3d at 1186 n.6. Here, because the members of the Commission exercise a traditional governmental function and because all Kansans are materially affected by and substantially interested in this function, the elections cannot satisfy the *Salyer/Ball* exception.

B. The Test for Determining Whether an Election Is of General Interest Focuses Primarily on How Those Excluded Are Affected and Interested.

When presented with an election in which "some resident citizens are permitted to participate and some are not," a court must apply strict scrutiny under the Equal Protection Clause to determine whether the discrimination among voters is justified. *Kramer*, 395 U.S. at 629. The first step in this analysis is to determine whether the outcome of the election is of general or limited interest and effect. *Kramer*, 395 U.S. at 632-33; *Cipriano v. City of Houma*, 395 U.S. 701, 704-06 (1969); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 207-12 (1970); *Salyer*, 410 U.S. at 726-30; *Hill*, 421 U.S. at 296-97.

This step will determine the level of scrutiny applied to the actual voter qualifications at issue. If the election is found to be one of general interest, the qualifications must be necessary to promote a compelling state interest. *Kramer*, 395 U.S. at 627; *Cipriano*, 395 U.S. at 704; *Kolodziejski*, 399 U.S. at 213; *Hill*, 421 U.S. at 297. If the election is found to be of limited interest, the qualifications must be reasonably related to the limited nature of the outcome of the election. *Salyer*, 410 U.S. at 730-31; *Ball*, 451 U.S. at 365 n.8.

The determination of whether the election is of general or limited interest focuses on the extent of the interest and effect of the "outcome of the election" on the electorate. *Hill*, 421 U.S. at 296; *Kramer*, 395 U.S. at 632; *Cipriano*, 395 U.S.

at 706; *Kolodziejski*, 399 U.S. at 209. The court asks whether all resident voters are "substantially affected and directly interested in" the outcome of the election. *Cipriano*, 395 U.S. at 706. If "all citizens are affected in important ways by" and "have a substantial interest in" the outcome of the election in question, then "the Constitution does not permit . . . the exclusion of otherwise qualified citizens from the franchise." *Kolodziejski*, 399 U.S. at 209.

The court does not initially look at the interest and effect with respect to the group included in the franchise. Indeed, in the first step the focus is not on the supposed special interests of the included voters. In the *Kramer* line of cases, the Court's focus was on "whether all those excluded [were] in fact substantially less interested or affected than those [included]." *Kramer*, 395 U.S. at 632; *see also Hellebust*, 42 F.3d at 1334 ("Our focus is not whether some of the Board's activities deal exclusively with agriculture, but whether its powers transcend that ground and materially affect residents . . . who are not represented by the present method of Board selection.").

An essential component for finding that a specific group is disproportionately interested in an election is a finding that all otherwise qualified voters do not have a substantial interest. *Hellebust*, 42 F.3d at 1335 ("Once a state agency has the authority to affect every resident . . . its powers are not disproportionate to those who vote for its officials."). The government has the

burden of proving that "all those excluded from voting [are] in fact substantially less interested or affected that those permitted to vote." *Hill*, 421 U.S. at 296. Here, the State has the burden of proving that all non-bar members do not have a substantial interest in or are materially affected by the activities of the Nominating Commission.

The Court in *Salyer* carefully observed that the case before it was unlike any earlier cases in this first step. *Salyer*, 410 U.S. at 726-27. Unlike in *Kramer*, the water district election did not "exclude[] many persons who had distinct and direct interests." *Id.* at 726. Unlike in *Cipriano*, the water district election did not "affect virtually every resident." *Id.* at 727. And unlike in *Kolodziejski*, those excluded from voting did not "have a great interest" in the outcome of the election. *Id.* When the subject of the election is an official or entity, the election is of general interest if the official "perform[s] important governmental functions [that are] general enough and have sufficient impact throughout the district." *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 53-54 (1970).

Rational basis scrutiny is applied only if the first step determines that the election is of limited interest. It is only rational for the government to limit the franchise *to those disproportionately interested and affected*. *Salyer*, 410 U.S. at 731; *Ball*, 451 U.S. at 371. If the exception is met, and the situation is one in which the government is constitutionally permitted to hold a limited election, the

only question that remains is whether it has limited the franchise to those interested. *Salyer*, 410 U.S. at 730-31. Here, as will be shown below, the elections are of general interest.

C. *Kramer*

In *Kramer*, the Supreme Court struck down a New York law that permitted only landowners (or lessees) and parents of school children to vote in school district elections. *Kramer*, 395 U.S. at 623. New York had argued that it had a legitimate interest in "restricting a voice in school matters to those 'directly affected' by such decisions." *Id.* at 631. The plaintiff-appellant, a resident of the school district, did not own property or have children enrolled in school and was therefore ineligible to vote in school district elections. He argued the law denied him his fundamental right to vote and that he was "substantially interested in and significantly affected" by the elections as "[a]ll members of the community have an interest in the quality and structure of public education . . . ." *Id.* at 630.

The Supreme Court held that the law failed strict scrutiny because, even assuming the State's asserted interest were valid, the law was "not sufficiently tailored to limiting the franchise to those 'primarily interested' in school affairs to justify the denial of the franchise to [plaintiff-appellant] and members of his class." *Id.* at 633. In short, because all residents were affected by the outcome of the election, all residents were entitled to vote. *Hellebust*, 42 F.3d at 1334. ("[T]he

test should be that those primarily interested in the election should vote. Because all qualified voters in Kansas meet that definition [all should vote].").

D. *Salyer* and *Ball*

The narrow exception to the principles of *Kramer* was established in *Salyer* and *Ball*. *Salyer* upheld a law permitting only landowners to vote for the board of a water district because (a) the district's sole purpose was to acquire, store, and distribute water for farming in the district; (b) it provided no "general public" services; and (c) the district's "actions disproportionately affect[ed] landowners" as all of the costs for the district's projects were assessed against them. 410 U.S. at 728-29. Relevant here is how *Salyer* distinguished the *Kramer* line of cases by pointing out that in those cases the limited group permitted to vote was *not* disproportionally affected by the outcome of the election. *Id*. at 726-29. Thus, under *Salyer*, when the functions and powers of the government entity are so far removed from normal government and so disproportionately affect a specific group, a popular election might not be required.

Similarly, *Ball* upheld an Arizona law that limited the right to vote in board elections for a power district to only landowners. 451 U.S. at 355-56. Furthermore, the law accorded weight to each vote in proportion to the amount of land owned by the eligible voter. *Id.* The Court stated the issue as whether "the peculiarly narrow function of this local governmental body and the special relationship of

one class of citizens to that body releases it from the strict demands of the one-person, one vote principle of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 357. The Court found in the affirmative, as the water district was "essentially [a] business enterprise[], created by and chiefly benefitting a specific group of landowners." *Id.* at 368.

Thus, under *Ball*, a restricted election is constitutional when the government entity or office has a peculiarly narrow function and has a special relationship with those allowed to vote. In finding that the facts before it satisfied these requirements, the Court in *Ball* rested its conclusion on the following premises: (a) the district had only a "nominal public character," *id*. at 368, (b) "the provision of electricity is not a traditional element of governmental sovereignty," *id*., and (c) the district had a "disproportionate relationship . . . to the specific class of people whom the system ma[de] eligible to vote," *id.* at 370.

E. *Hellebust v. Brownback*

This Court has applied these principles in an analogous case where Kansas had restricted the selection of the Board of Agriculture to delegates from agricultural organizations. *Hellebust*, 42 F.3d at 1332-33. The plaintiffs in that case alleged that this selection scheme violated their Equal Protection rights because the Board "exercised broad authority affecting arguably all Kansans and is not limited solely to agriculture or agribusiness interests." *Id.* at 1332. The State

had argued that the laws administered by the Board all predominantly related to agriculture, so that it was appropriate to limit the selection of the members of the Board to the groups primarily affected by those laws. *Id.* at 1334.

But this Court struck down the arrangement. This Court found that the election scheme did not qualify for the narrow exception to the principles of *Kramer* developed in *Salyer* and *Ball*. Even accepting that the majority of the Board's functions only affected agricultural interests, the fact that the Board exercised some normal governmental functions and materially affected all Kansans meant that the election of the Board had to be open to all qualified residents. *Id.* at 1334-35.

The same result should be found here. The State holds elections for members of the Nominating Commission. That Commission exercises a core governmental function affecting arguably all Kansans and is not limited solely to the interests of members of the bar. Therefore, the elections do not satisfy the *Salyer/Ball* exception and violate the Voters' Equal Protection rights.

II. This Case Is Indistinguisable from *Hellebust* and Should Have the Same Result.

The District Court below found that the selection of the members of the Commission here is distinguishable from the selection of the Board of Agriculture at issue in *Hellebust*, so that the *Salyer/Ball* exception applies. (ER 32).

Specifically, the District Court found that the Board in *Hellebust* had "myriad duties" while the Commission here "has but one function: to screen applicants to fill vacancies on the Kansas Supreme Court and Court of Appeals." (ER 32). According to the District Court, the Board exercised powers that "affect all residents of Kansas daily," while the Commission here has no such powers. (ER 32). But the District Court fundamentally misapplied *Hellebust* because that case did not turn on the number of duties or powers exercised by the Board nor on the fact that the Board had regulatory authority. Rather, in keeping with Supreme Court precedent, *Hellebust* focused on the how whether those excluded were affected by the Board's powers and whether its functions were "governmental" in nature.

In *Hellebust*, this Court began with the fundamental principle that, in an election of general interest, any restriction other than age, residence, or citizenship must be necessary to promote a compelling state interest. *Hellebust*, 42 F.3d at 1333. This principle applies with full force regardless of the type of function—legislative, executive, judicial, or administrative—exercised by the public official. *Hadley*, 397 U.S. at 52; *see Avery*, 390 U.S. at 482 (finding that the entity at issue performed "some tasks which would normally be thought of as 'legislative,' others typically assigned to 'executive' or 'administrative' departments, and still others which are 'judicial'"). Thus, the classification of the

function of a public official does not determine whether the Equal Protection voter eligibility principle applies to the election of that official. Rather, the Court looks to whether the election is of general or limited interest.

The Supreme Court has developed two distinct lines of cases for applying the Equal Protection clause to the right to vote. *Salyer*, 410 U.S. at 730 ("[A]ppellants derive no benefit from the *Reynolds* and *Kramer lines of cases* . . . .") (emphasis added). The line of cases beginning with *Reynolds v. Sims*, 377 U.S. 533 (1964), developed the "reapportionment doctrine" regarding the constitutionality of the geographic apportionment of voting districts. *See Bd. of Estimate v. Morris*, 489 U.S. 688, 691-92 (1989) (tracing the development of the "reapportionment doctrine" in the *Reynolds* line). The reapportionment doctrine ensures that the right to vote is not diluted by requiring "population equality between electoral districts." *Id.* at 693. Malapportionment of voting districts is not at issue in this case.

The other line of cases developed by the Supreme Court from *Kramer* treats the constitutionality of "voter qualifications." *See Carrington*, 380 U.S. at 98 (Harlan, J., dissenting); *Mo. Protection and Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 808 (8th Cir. 2007) (tracing the line of cases developing the law on "voter eligibility requirements"). While the two lines of cases are related, the basic principle announced by this Court in *Hellebust* was established and developed in

the *Kramer* line. *Hill*, 421 U.S. at 297-98 ("[T]he principles of *Kramer* apply to classifications limiting eligibility among registered voters."). This line of cases governs when "a state law discriminates among eligible voters within the *same* electoral district," and establishes that "compelling government interests must justify restrictions of the franchise." *City of Herriman*, 590 F.3d at 1185-86. This is precisely what is at issue here. The State of Kansas holds elections for public officials and discriminates among voters within the same districts, and the state at large, when granting the franchise.

There is a narrow and rarely applied exception to the voter qualification rule established in *Kramer* and summarized in *Hill*. *Hellebust*, 42 F.3d at 1333; *City of Herriman*, 590 F.3d at 1186 n.6 ("Only a narrow line of Supreme Court cases . . . tempers these holdings."). The Supreme Court has held that the default principle from *Kramer* "does not apply to units of government having a narrow and limited focus which disproportionately affects the few who are entitled to vote." *Hellebust*, 42 F.3d at 1333. This exception was developed in the *Salyer* and *Ball* cases and has not been applied by the Supreme Court since then. The exception has never been applied, by the Supreme Court or any Circuit Court, to a legislative, executive, or judicial official. It has only been applied to entities with limited administrative authority. *See, e.g.*, *Kessler v. Grand Cent. Dist.*

Management Ass'n, Inc., 158 F.3d 92 (2nd Cir. 1998); *Education/Instruccion, Inc. v. Moore*, 503 F.2d 1187 (2nd Cir. 1974).

According to this exception, if the government can show that (1) the entity does not exercise "normal governmental authority" and (2) the entity's function "disproportionately affects" only a certain group, then the election is of limited interest and the franchise may be restricted accordingly, subject only to rational basis scrutiny. Before the exception can be applied, however, it must be established that "all those excluded are in fact substantially less interested or affected than those the statute includes." *Kramer*, 395 U.S. at 632. An examination of how the Supreme Court applied this exception in *Salyer* and *Ball*, as well as this Court's only application of the exception in *Hellebust*, reveals that the election of the members of the Commission here is of general interest and cannot satisfy the strict standards of the limited purpose exception.

A. Application of the *Salyer/Ball* Analysis in *Hellebust*.

This Court's decision in *Hellebust* began with the general principle that when a state holds an election for a public official and limits the franchise in that election, regardless of the classification of the office, the restriction on the franchise must be necessary to achieve a compelling state interest. *Hellebust*, 42 F.3d at 1333. This Court then turned to the question of whether the election before it was of general or limited interest by applying the analysis from *Salyer* and *Ball*.

Hellebust looked to the factors considered in those cases and determined that the Kansas Board of Agriculture exercised "core governmental powers" that "unremittingly influence every person within the State of Kansas" so that the election of the Board could not be restricted.

The District Court's application of *Hellebust* to the election of the Commission here is inconsistent with this Court's analysis. The District Court here decided that the Commission qualified for the *Salyer/Ball* exception because it performed "but one function" and did not exercise regulatory power. These conclusions fundamentally misapply the *Salyer/Ball* analysis. Nothing in the *Kramer* line of cases, which includes *Salyer* and *Ball*, nor in this Court's application in *Hellebust* supports the position that whether an election is of general or limited interest turns on the number of functions performed by the official or whether the entity performs regulatory functions.

From *Salyer*, *Hellebust* noted that the water district "had relatively limited authority because it provided only for the acquisition, storage, and distribution of water for farming in a localized basin." *Id.* The water district did not perform any other general public services or exercise "normal governmental authority." *Id.* The fact that the water district in *Ball* had more diverse and far-reaching powers did not affect the result, because at base, the administration of water and electricity are not "the sort of governmental powers that invoke the strict demands of *Reynolds*."

Id. at 1334 (quoting *Ball*, 451 U.S. at 366). The water districts in *Salyer* and *Ball* had a merely "nominal public character" because their functions were not "core governmental powers," no matter how diverse their function or how many people were affected by them. *Id.* at 1334, 1335.

This Court proceeded to apply these distinctions to the selection system before it. It looked at "each of the Board's powers . . . ranging . . . from regulating the healthfulness of milk and meat sold in the state to generally regulating all weights and measures." *Id.* 1334. And this Court concluded that these powers were general governmental powers that affected all Kansans. The powers dealt with matters "within the state's police powers and comprise part of the normal functions of state government." The regulation of health , safety, and general welfare has always been a core govenmental function, rather than a private one. By way of contrast, the provision of water and electricity is not a core governmental power, but a "nominally public" one. *Hellebust* held that this principle embraced "*each* of the Board's powers," and that it was not permissible to permit "the specialized to override the general *once* general powers are found." *Id.* (emphasis added). Thus, this Court clarified that even one general governmental power would deprive a public official from the *Salyer/Ball* exception.

Hellebust found that the Board's powers, accordingly, did not disproportionately affect agricultural groups. "Our focus is not whether some of the Board's activities deal exclusively with agriculture, but whether they transcend that ground and materially affect residents of Kansas who are not represented by the present method of Board selection." *Id.* Thus, this Court carefully looked to whether all those excluded from the franchise were "in fact substantially less interested or affected than those the statute includes." *Kramer*, 395 U.S. at 632. This Court concluded that, though most of the Board's functions might exclusively affect agriculture, the Board had powers that materially affected and influenced every Kansan. *Hellebust*, 42 F.3d at 1335.

Thus, the fundamental holding from *Hellebust* reveals two principles, in keeping with *Salyer* and *Ball*. First, if every voter is materially affected by and interested in the function of a public official, then the franchise must be granted accordingly. *Id.* at 1334-35. Second, if a public official performs one function that is a "core governmental power" that compises "part of the normal functions of state government," even if one among many, the official cannot qualify for the *Salyer/Ball* exception. *Id.*

B. The District Court's Application of *Hellebust* Was Erroneous.

The District Court's reasoning was inconsistent with these findings from *Hellebust*. The distinctions made by the District Court when contrasting the

function of the Nominating Commission with the powers of the Board of Agriculture were expressly disregarded in *Hellebust* and are undermined by other Supreme Court cases considering the question of whether an election is of general or limited interest.

1. "Myriad Duties" v. "But One Function."

The District Court's first distinction was that the Board in *Hellebust* had "myriad duties" while the Commission here has "but one function." (ER 32). But *Hellebust* and other precedent reveal that this distinction has absolutely no constitutional significance. *Hellebust* repeatedly found that a single "governmental power" was enough to remove a public official from the *Salyer/Ball* exception. *Hellebust*, 42 F.3d at 1334 ("[*O*]*nce* the line is crossed into the governmental powers arena, one person, one vote applies."); *id.* ("That conclusion embraced *each* of the Board's powers."); *id.* (" . . . *once* general powers are found . . . ."); *id.* at 1335 ("*Once* a state agency has the authority to affect every resident . . . ."). It was not the diversity and number of powers exercised by the Board that made it a general interest entity. Rather, it was the nature and effective reach of each of those powers that was constitutionally significant. It is clear from *Hellebust* that the Board would not have qualified for the *Salyer/Ball* exception if it had "but one function," and that function was a core governmental power.

Other precendents from the Supreme Court and other circuits further undermines the District Court's conclusion that there is any significance to the number of functions exercised by an entity. In *Cipriano v. City of Houma*, 395 U.S. 701 (1969) and *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970), for example, the Supreme Court considered whether the franchise could be limited in ballot measure elections. These ballot measures had just one issue involved and related to whether bonds should issue. Thus, it is the importance of the function that is relevant. For another example, the Electoral College performs only one function: electing the president. Yet that function affects every citizens, albeit indirectly, and every citizen is substantially interested in that function.

Furthermore, in *Little Thunder v. South Dakota*, 518 F.2d 1253 (1975), the Eigth Circuit struck down franchise restrictions for offices such as county recorder of deeds, coroner, and auditor. In South Dakota, some counties are unorganized, meaning they do not have their own public officials, but are attached to an adjacent county for purposes of administration. *Id.* at 1254-55. But, as a result, the residents of the unorganized counties were excluded from participating in the elections for the county officials who governed them because they did not reside in the organized county. *Id.* at 1255. The court initially noted that the lower court had used the wrong standard, but should have used strict scrutiny. *Id.* ("In an

election of general interest, conditions, limitations or restrictions on the franchise, of any character, must meet a stringent test of justification.").

The Eighth Circuit determined that the residents of the unorganized counties also had a substantial interest in the choice of the officials of the attached organized county and that those officials exercised "governmental powers." *Id.* at Those officers frequently had "but one function," but the court held that their elections were of general interest and could not be restricted. Surely the binding nomination of state supreme court justices is at least as much of a normal governmental function as the recording of deeds.

2. The Power to Nominate Judges.

The District Court then found that the Commission's function was not a core governmental power such that the Equal Protection Clause must apply to the elections of its members, because the Commission does not ultimately appoint the judges and because the Commission does not have regulatory functions that "affect all residents of Kansas daily." But the District Court's analysis here was again inconsistent with *Hellebust* and other precendents.

First of all, the District Court was incorrect when it characterized the Commission's function as "to screen applicants to fill vacancies." (ER 32). The Commission does not screen applicants, it nominates judges. Kan. Const. art. III, § 5(a); Kan. Stat. § 20-132. The Kansas constitution and statutes say nothing about

"screening applicants," but instead empowers the Commission to make binding nominations for vacancies on Kansas's courts. The ultimate question is thus whether the nomination of judges is itself a traditional governmental function or a "nominally public" one. The District Court did not even consider this question, much less offer any support for the assumption that the appointment of judges is a governmental function while the nomination of judges is not.

But the nomination of judges is a core governmental power. Both *Ball* and *Hellebust* made the distinction between a normal "governmental" function and a "nominally public" function. *Ball*, 451 U.S. at 367-68; *Hellebust*, 42 F.3d at 1333-34. In *Ball*, the Court found that the provision of water and electricity is not traditionally a "governmental" function, but has been traditionally performed by private entities, so that the water districts were essentially business enterprises co-opted by the government. *Ball*, 451 U.S. at 368. In *Hellebust*, on the other hand, this Court observed that the regulation of health and safety has traditionally been a governmental matter and part of the normal functions of state government. *Hellebust*, 42 F.3d at 1335. So the Court must look to whether the nomination of judges is traditionally a governmental function, like the regulation of health and safety, or an essentially private one, like the provision of water and electricity.

The Court in *Ball* weighed several factors when making this distinction. It considered that the water districts were pre-existing private entities that were co-

opted by the state for financing purposes. *Ball*, 451 U.S. at 368. The Court then observed that the provision of electricity "is not a traditional element of governmental sovereignty," in the sense that the entity could be liable under 26 U.S.C. § 1983. *Id.* at 368 (citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)). *Ball* concluded that the water district therefore did not exercise "the sort of general or important governmental function" that would invoke the commands of Equal Protection.

By the same factors, the nomination of judges is a governmental power that invokes the Equal Protection Clause. The nomination of judges has never been performed by a private entity in this country. Rather, it has traditionally been the function of the highest executive or legislative officials, *see, e.g.*, U.S. Const. art. II, § 2 ("The President shall . . . nominate . . . Judges of the Supreme Court, and all other Officers of the United States."); Larry C. Berkson, *Judicial Selection in the United States: a special report*, American Judicature Society (April 2010), *avaliable at* http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf, or has been accomplished through primary elections, *see, e.g.*, *Gray*, 372 U.S. at 370. The Commission is in no sense a pre-existing "nominally public" entity that was co-opted by the state.

It is very significant here that the nominations made by the Commission are absolutely binding. They are not recommendations or suggestions. *See*

Education/Instruccion, 503 F.2d at 1189 (upholding a limited purpose election on the basis that the entity was "essentially advisory" and could make no binding decisions). They cannot be rejected by the governor and are not subject to any kind of legislative confirmation at any stage. In this way, the power to nominate exercised by the Commission is even greater than the parallel power exercised by the President, whose nominations are subject to approval by the Senate.

Furthermore, courts have held that the members of judicial nominating commissions can be held liable under 26 U.S.C. § 1983. *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982); *see also McMillan v. Svetanoff*, 793 F.2d 149, 153-54 (7th Cir. 1986). In *Richardson*, the Ninth Circuit held that the members of a judicial nominating commission do not qualify for judicial immunity from civil rights action liability because they perform a traditionally executive governmental function. *Richardson*, 693 F.2d at 914-15. *Ball* drew a direct parallel between this liability analysis and its consideration of whether a government entity performed the kind of function that would invoke Equal Protection principles. *Ball*, 451 U.S. at 368. As *Richardson* shows, a judicial nominating commission performs the kind of function that is traditionally associated with sovereignty and so cannot satisfy the requirements of the *Salyer/Ball* exception.

In addition, the Supreme Court has held that the strict requirements of Equal Protection apply fully to the nomination of judges in a primary election. *Gray*, 372

U.S. at 370; *see Smith v. Allwright*, 321 U.S. 649 (1944). Any restriction of the franchise in a primary election to nominate judges, therefore, would have to be shown necessary to acheive a compelling state interest. And the Supreme Court has held that occupational voter qualifications cannot survive Equal Protection scrutiny. *Harper*, 383 U.S. at 667. It stands to reason that if the nomination of judges through primaries invokes the *Kramer* rule, the election of an official with the power to nominate judges must also satisfy that rule and cannot satisfy the *Salyer/Ball* exception.

3. Affecting Daily Lives.

The District Court went on to discuss other characteristics of the Commission indicating that it did not "affect all residents of Kansas daily" and so is a limited purpose entity. But *Hellebust* did not establish as a test, or even a factor of a test, that the election of a public official is only of general interest if the official has regulatory power that "affect all residents daily." This Court considered the "daily effect" relevant in *Hellebust* because the Board only had administrative power; it did not exercise any legislative, executive, or judicial authority. Therefore, this Court had to analyse the effective reach of the Board's powers, which happened to be regulatory in nature. In this case, the Commission exercises an executive function, so that whether it has a regulatory effect upon the

daily lives of Kansans has no constitutional significance. The power to appoint judges, for example, would also

Indeed, if this were the standard, it would lead to absurd results, because residents are inherently more directly affected in their daily lives by lower level administrative officials than by higher officials in state government. The District Court acknowledged this when it stated that the daily lives of residents were affected more by local courts than by the state supreme court. (ER 32). The necessary conclusion, if "effect on daily life" were the standard, would be that the highest public officials in the judicial branch of government are somehow of *less* general interest than local judges. In fact, if the District Court were correct here, a host of non-regulatory public officials, including state supreme court judges, could be chosen though limited elections.

4. Attributes the Commission Lacks.

The same can be said of the fact that the Commission has no staff. (ER 32). Many public officials who doubtless perform traditional governmental function have no staff or share staff with other government units. This point cannot have constitutional significance. Indeed, several entities that have been held to satisfy the *Salyer/Ball* exception had large staffs, could levy taxes, and had a profound effect on the daily lives of those who were excluded from the franchise. *See Plowman v. Massad*, 61 F.3d 796, 798 (10th Cir. 1995) (finding that the Board of

the Registered Dentists of Oklahoma satisfied the *Salyer/Ball* exception); *Salyer*, 410 U.S. at 728 n.7 (noting that the water district had staff, could condemn private property, and issue bonds); *Kessler*, 158 F.3d at 92 (business improvement district).

The standard from *Hellebust*, in accord with *Salyer* and *Ball*, is whether those excluded from the franchise are materially affected by and substantially interested in the activities of the Commission. The Voters here, like all Kansans, are materially affected by and substantially interested in the nomination of their state judges.

The District Court also remarked that the Commission "has no power to set the requirements for admission to the Kansas bar, nor does it regulate or supervise the conduct of Kansas attorneys." (ER 32). This fact militates *against* the conclusion that attorneys are disproportionately interested in and affected by the election of the Commissioners. The District Court took pains to emphasize that it should not look beyond the Commission's function to consider how Kansans and attorneys are affected by the Kansas Supreme Court. (ER 31). But it was Defendants below who suggested that the limited election was justified because attorneys are regulated by the Kansas Supreme Court. The Commission itself, because it has no such regulatory function, but simply nominates judges, has no

more effect, much less a disproportionate effect, on attorneys than on all other Kansans. Therefore, the elections here cannot satisfy the *Salyer/Ball* exception.

The District Court then noted that the Commission "is not subject to legislative and executive controls." (ER 32). But, in light of *Hellebust*, this factor also cuts against the application of the *Salyer/Ball* exception. In *Hellebust*, this Court held that the Board of Agriculture was still a general purpose entity *despite* being subject to legislative and executive controls. *Hellebust*, 42 F.3d at 1334-35. The fact that the Commission makes binding judicial nominations without any control or review by the legislature and executive underlines the conclusion that it exercises a powerful core governmental function.

Therefore, under this Court's rationale in *Hellebust*, together with the analysis in the *Salyer* and *Ball* cases, the elections of the members of the Commission do not satisfy the limited purpose exception and violate the Equal Protection Clause.

III. Kansas Cannot Show That the Exclusion of Non-Attorneys from the Elections of Members of the Nominating Commission Is Narrowly Tailored to a Compelling Government Interest.

The facts in this case differ substantially and significantly from the cases where the Supreme Court has upheld a restriction of the vote to a certain group of citizens while excluding everyone else.

The Nominating Commission here shares none of the characteristics of the water districts in *Salyer* and *Ball*. First and foremost, the Commission performs a normal function of government and exercises traditional government authority, even if only the single power of nominating the judiciary. *See Salyer*, 410 U.S. at 728-29; *Ball*, 451 U.S. at 366, 368. *Salyer* and *Ball* did not provide an exhaustive list of normal government functions and gave no indication that the entity's functions were narrow if they were few. *Ball*, 451 U.S. at 366. The power to nominate is not a private power and has never been exercised by a private entity in any of the governments of the United States. Many private entities provide water services, but the nomination of government officials is inherently a traditional element of government sovereignty. *Ball*, 451 U.S. at 368.

Furthermore, the entities are different in origin. *Ball*, 451 U.S. at 367 (finding that the "originating purpose of the District" was "relatively narrow"). Unlike water districts, the Commission does not have a "nominal public character." *Id.* at 368. The water districts were pre-existing private business entities co-opted by the government for the purpose of simplifying revenue. *Id.* at 369. In sharp contrast, the Commission is an entity established by the constitution as part of the structure of the government to determine who the highest officers of a branch of government will be.

The Commission is part of the structure of the government and exercises government power. All Kansans are substantially interested in the exercise of this government power, because all Kansans have an interest in who exercises judicial power. All Kansans are affected by the exercise of this power, because all Kansans are subjected to the law as interpreted and applied by the judiciary. *See Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002).

This is not a political interest. Rather, it is an interest that stems from the fact that governments in this country receive power by the consent of the governed. The litigant standing before the judge who will decide whether and how often she will see her children has a substantial interest in who is exercising that power over her. The litigant standing before the judge who will decide whether he will spend the rest of his life in prison has a substantial interest in who that judge is. It is inconceivable that all Kansans have a substantial interest in having a fair, qualified, and independent judiciary and yet somehow apparently do not have a substantial interest in how that judiciary is selected.

Thus, there is no analogous disproportionate relationship between the Commission and a group of the population. In *Salyer* and *Ball*, landowners were the only group bearing the cost of the water districts and water was distributed based upon land. *Salyer*, 410 U.S. at 729-30; *Ball*, 451 U.S. at 370-71. Attorneys are no more affected by or interested in who judges are than the litigants they

represent. Even if attorneys were more interested and affected, everyone else must be "in fact *substantially less* interested or affected." *Kramer*, 395 U.S. at 632. The State has not shown how the interests of attorneys is more than merely "different," *Kolodziejski*, 399 U.S. at 209, or that the interests of the general population are substantially lower.

Here, Kansas cannot show that the functions of the Nominating Commission are "so far removed" from the normal functions of government and serve such a "peculiarly narrow function" to satisfy the exception to the demands of the Equal Protection Clause. The members of the Commission are given the power to select nominees to fill vacant positions on Kansas's courts, including the supreme court. The Governor must select one of the nominees, so that the Commission decides who will sit in justice over the citizens of Kansas. The nomination of justices and judges is a traditional function of government. The Commission has the power and duty to determine the composition of the third branch of government in the State of Kansas. *See* Kan. Const. art. III, § 5. The Commission does not have a "nominal" public character and the nomination and appointment justices and judges is a traditional governmental function. *See Hellebust*, 42 F.3d at 1334 ("Thus, while an entity's 'nominal public character' may shield it from the demands of the Fourteenth Amendment and permit a rational relationship analysis,

once the line is crossed into the government powers arena, one person, one vote applies.") (citations omitted).

Furthermore, Kansas cannot show that the functions of the Commission "so disproportionately affect" the members of bar that they have a "special relationship" with the Commission to satisfy the requirements of the limited purpose exception. While the members of the Kansas bar might have *different* interests in who the justices and judges are in Kansas, this interest is not substantially *greater* than the interest of all Kansans. *See Kolodziejski*, 399 U.S. at 212. The Plaintiffs are subject to the jurisdiction and decisions of the justices and judges of Kansas's courts. The Plaintiffs are subject to the laws and constitution of the State of Kansas, which is interpreted and applied by the justices and judges of Kansas's courts. They are legitimately interested in the composition of the third branch of their own government. The selection and nomination of justices and judges substantially affects all of Kansans.

Therefore, the narrow Equal Protection exception described in *Salyer* and *Ball* has no application to the selection of members of the Nominating Commission, which is instead governed by the strict Equal Protection review mandated by *Kramer*.

IV. *Kirk* Is Distinguishable and Does Not Compel Any Result Here.

The District Court here relied extensively upon *Kirk v. Carpeneti*, 623 F.3d 889 (9th Cir. 2010), in which the Ninth Circuit upheld a challenge to the way Alaska selects the attorney members of its judicial nominating entity. (ER 33-38). But the selection system in that case is not analogous to the system here and that decision does not even involve an analysis of a franchise restriction on an election. *Kirk* is not instructive and does not compel any result here. Nor is *Kirk* necessarily inconsistent with *Hellebust*.

A. *Kirk* Is Distinguishable.

Alaska's version of the merit selection system for selecting judges is different from that used in Kansas. In Alaska, justices and judges must be appointed by the governor from two or more nominees forwarded by the Alaska Judicial Council ("Council"). Alaska Const. art. IV, § 5; Alaska Stat. § 22.05.080(a). The Council is composed of seven members. Alaska Const. art. IV, § 8. One is the current chief justice of the Alaska supreme court, who sits ex officio. *Id.* Three members, who must be non-attorneys, are appointed by the governor subject to confirmation by the legislature in joint session. *Id.* And the final three members must be attorneys and are appointed by the Board of Governors of the Alaska Bar Association ("Board of Governors") without any legislative confirmation or approval. *Id.*; Alaska Stat. § 08.08.020. In Kansas, the

attorney members of the Kansas Supreme Court Nominating Commission ("Commission") are elected by the resident members of the Kansas bar. Kan. Const. art. III, § 5(e); Kan. Stat. §§ 20-119, -120.

The Ninth Circuit's decision in *Kirk* turned upon the fact that the Council members are appointed rather than elected. *Kirk*, 623 F.3d at 898 ("As the district court correctly concluded, however, the right to equal voting participation has no application to the Judicial Council because the members of the Council are appointed, rather than elected."). The fundamental holding of the case is that the Equal Protection Clause does not require limiting "appointment power to officials who have been popularly elected." *Id.* at 899. According to the court, there could be no violation of Equal Protection in the selection of the Council because its members are appointed. *Id.* at 898. Meanwhile, the only election involved was arguably a limited purpose election. *Id.* The court did not consider or evaluate whether the Council itself would qualify as a limited purpose entity. *Id.*

In Kansas, Plaintiffs and all non-attorneys are excluded from the elections for the attorney members of the Supreme Court Nominating Commission. Thus, the sole issue is whether this voter classification can survive Equal Protection scrutiny or satisfies the limited purpose exception. While the reasoning in *Kirk* turned on whether an appointing official must be popularly elected, no such

question is presented here. Therefore, *Kirk* is not directly applicable to this case and did not consider the same question.

B. The Result in *Kirk* May Be Inconsistent With *Hellebust*.

The District Court below did not establish that this case is analogous to *Kirk* in any way, but used *Kirk* to argue that Appellants' arguments are incorrect. But the arguments advanced in *Kirk* are not the same as those here. As the Ninth Circuit noted in *Kirk*, the plaintiffs did not argue that "they are being excluded from an election for a state official in which they are entitled to vote." *Id.* at 898. But here, that is precisely what Appellants are alleging. Nevertheless, if *Kirk* could somehow be used to justify the exclusion of all non-bar members from the franchise in the elections of the members of the Nominating Commission in Kansas, then it must be considered inconsistent with *Hellebust*.

The court in *Kirk* concluded that an entity that does not satisfy the limited purpose exception may be appointed by an entity elected with the same voter qualifications that would be unconstitutional if applied to the appointed entity. *See id.* at 898-99. According to *Kirk*, if an official is appointed, no matter what powers it exercises, the Equal Protection Clause is not implicated by any voter qualifications placed upon the election of the appointing official. *Id.* at 898. In other words, when an official is appointed, the Equal Protection Clause has no

bearing on who may do the appointing. *Id.* at 899 (concluding that *Kramer* says nothing as to how an appointing official must be selection themselves).

But this conclusion is inconsistent with this Court's decision in *Hellebust*. The selection scheme for the Board of Agriculture in *Hellebust* was similar to the selection of the members of the Alaska Judicial Council in *Kirk*. In Alaska, the members of the Alaska Bar Association elect the members of the Board of Governors of the Bar, a twelve member Board, who in turn "appoint" the attorney members of the Council by majority vote. *Id.* at 893. In *Hellebust*, the members of Kansas agricultural organizations elected delegates, who in turn "elected" the members of the Board of Agriculture. *Hellebust v. Brownback*, 824 F. Supp. 1511, 1513, 1515 (D. Kan. 1993) (referring to the selection system as a "hybrid electoral system").

In *Kirk*, the court affirmed the holding that the appointment of the Council by the Board does not implicate the Equal Protection Clause so that the Clause has no bearing on how the Board of Governors of the Bar is elected. *Kirk*, 623 F.3d at 898 (citing *Sailors v. Bd. of Educ.*, 387 U.S. 105, 111 (1967)). But *Hellebust* expressly rejects this interpretation of *Sailors*. *Hellebust*, 824 F. Supp. at 1522-23. Similar to the system at issue in *Kirk*, the Board of Agriculture in *Hellebust* was not directly elected by the members of agricultural organizations. Rather, the Board was selected by a delegation of representatives from those organizations,

just as the Board of Governors in Alaska represents the members of the Alaska Bar. There is a direct parallel between the Board of Governors of the Alaska Bar and the delegation sent by the agricultural organizations in *Hellebust*. If *Kirk* is correct, then the system in *Hellebust* would have been constitutional if the delegation had been a twelve member "Board" who, among other things, "appointed" the members of the Board of Agriculture. But this is entirely inconsistent with this Court's reasoning in *Hellebust*. *Hellebust* focused on the fact that Kansans who were not members of agricultural organizations were excluded from the selection process. *Hellebust*, 42 F.3d at 1334.

The Ninth Circuit in *Kirk* also found that there could be no meaningful violation of Equal Protection in the Alaska selection scheme because the governor ultimately makes the appointments. *Kirk*, 623 F.3d at 900. But this conclusion directly conflicts with this Court's conclusion that the authority exercised by an entity and the need for it to be selected consistent with the commands of Equal Protection are undiminished by whatever effect or check another official might have on the entity. *Hellebust*, 42 F.3d at 1335.

For these reasons, the *Kirk* decision is inconsistent with the Tenth Circuit's decision in *Hellebust* in its application of the Equal Protection Clause and so cannot be considered persuasive. Rather, this Court should analyze the selection of the members of the Supreme Court Nominating Commission according to the

principles and reasoning in *Hellebust*. But *Kirk* is actually distinguishable, as described above, and this Court does not have to consider it inconsistent with *Hellebust*.

C. *Kirk* Is Fundamentally Inconsistent With Supreme Court Equal Protection Jurisprudence.

The court in *Kirk* opened its discussion by observing that the Supreme Court's Equal Protection cases generally involve only executive and legislative offices, while the case before it involved neither branch of government. *Kirk*, 623 F.3d at 897. And the court concluded that the decision to give attorneys a particular role in the nomination of judges is therefore within the state's discretion. *Id.* But there is absolutely no authority in any Supreme Court or Ninth Circuit precedent for this foundational premise, as is evidenced by the fact that the court in *Kirk* could not cite to a single case in support.

On the other hand, the Supreme Court has applied the Equal Protection principles of *Kramer* and *Reynolds* with full force to the selection of judges. *See, e.g.*, *Carrington*, 380 U.S. at 96 (striking down occupational exclusion on elections including judicial elections); *Gray*, 372 U.S. 803-804 (striking malapportionment system for primary elections, including judicial primaries); *see also Little Thunder*, 518 U.S. at 1254 (striking down franchise exclusion, including for judicial elections). The only exception to this is the summary

affirmation in *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973).

The court in *Kirk*, as well as the State of Alaska, fully acknowledged that the selection system at issue gave attorneys, as an occupation, a greater voice and more influence over the nomination of judges in Alaska than non-attorneys. *Kirk*, 623 F.3d at 900. As in *Hellebust*, the scheme in Alaska "is not intended to give all [Alaskans] an equal vote in selecting the members of the [Alaska Judicial Council]." *Hellebust*, 824 F. Supp at 1513. But the Ninth Circuit concluded that this inherent inequality does not violate the Equal Protection Clause because there is no constitutional requirement that all participants in the selection of a public official "must either be popularly elected, or be appointed by a popularly elected official." *Kirk*, 623 F.3d at 891.

But at no time did the Plaintiffs/Appellants in *Kirk* ever suggest that every appointing official must be directly popularly elected. Rather, Plaintiffs contended that an appointing official may not be elected subject to the same voter qualifications that would be unconstitutional if placed upon the election of the appointed official. The Equal Protection Clause, of course, does not mandate elections for every public official. *Kramer*, 395 U.S. at 629. But it does forbid *inequality of influence* in the selection of public officials, whether this inequality arises from voter qualifications or malapportionment of districts, appointments or

hybrid election systems. *See id*. at 626-27 & n.7. When franchise restrictions on the election of a given official would be unconstitutional, then that official, if appointed instead, must be appointed by an official or entity free of the same franchise restrictions. This principle is clearly recognized in *Kramer* and is universally respected.

Kramer recognized this principle in refuting the very same argument advanced by the State of Kansas here. *Id.* at 629; (Doc. 20 at 6). The state in *Kramer* had argued that it could constitutionally limit the franchise because it could have eliminated the election altogether and had the officials appointed. *Id.* But the court rejected this argument by stressing that the reason why an appointment would not violate Equal Protection is *because with an appointment no one would be excluded and each resident's influence would be equal*. *Id.* at n.7. States do have latitude in determining whether an official will be elected or appointed, but they do not have discretion as to who may do the appointing. *Kramer*, therefore, expressly contemplates that an appointment would implicate the Equal Protection Clause if it resulted in *inequality of formal influence* over the selection of the appointed official. The Supreme Court supported this principle in *Sailors* when it noted that the appointive system at issue did not implicate Equal Protection because *no one was excluded* from the election of the appointing

entities. *Sailors*, 387 U.S. at 111. *Kirk* is therefore entirely inconsistent with *Kramer* and *Sailors*.

If *Kirk* were correct, it would render the principles in *Kramer* absolutely meaningless. Following *Kirk*, instead of placing franchise restrictions on direct elections for the school board, the government in *Kramer* could have simply had the school board appointed by a limited purpose entity, such as a landowners or parents association, elected with the very same franchise restrictions. *Kirk*'s fundamental holding is that this arrangement would be perfectly constitutional. Yet this holding is entirely logically inconsistent with the reasoning in *Kramer*.

Neither Alaska nor the Ninth Circuit could point to a single instance in which this principle has been rejected by the Supreme Court or is not observed in the appointment of public officials. The selection of federal magistrate judges, for example, fully conforms to the principle maintained by the Plaintiffs in *Kirk*. *Contra Kirk*, 623 F.3d at 900. The Plaintiffs in *Kirk* never suggested that all appointing officials must be directly popularly elected. Magistrates are appointed by the district court judges in a district from nominations made by a merit selection panel. The district judges are appointed by the President with Senate confirmation, and no one is excluded from the elections of the President and Senate. And the judges select all the members of the merit selection panels and then make the appointments of the magistrates. Therefore, in accordance with the

principles of *Kramer*, no citizen is excluded from the selection of any official involved in the process for selecting magistrate judges, however indirect their vote might be. This is what the Equal Protection Clause requires.

V. No Other Exceptions to Strict Application of Equal Protection Scrutiny Apply.

A. *Wells*

Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973), held that when a state holds elections for judges, it does not need to ensure that "equal numbers of voters can vote for proportionately equal numbers of [judges]." *Hadley*, 397 U.S. at 56. The Supreme Court's summary affirmation of *Wells*, however, does not mean that all applications of the Equal Protection Clause have no relevancy to the selection of the judiciary. Rather, it simply means that malapportionment in judicial election districts is not a violation of the Fourteenth Amendment. It does not follow that the other guarantees of the Equal Protection Clause, such as the "principles of *Kramer*," *Hill*, 421 U.S. at 297, are irrelevant to the selection of a state's judiciary.

Wells does not mean that a state may establish qualifications other than residency, age, and citizenship for participation in judicial elections on rational basis alone. If this were otherwise, it would lead to the absurd result that a state

could exclude citizens from judicial elections based upon occupation, impose a poll tax, or any other factor they deem reasonable.

Thus, Supreme Court precedent has only declared that geographic population apportionment is not mandated in judicial elections by the Equal Protection Clause. *See Republican Party of N.C. v. Martin*, 980 F.2d 943, 952-54 (4th Cir. 1993); *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 211-12 (5th Cir. 1980). The Supreme Court has given no indication that voter qualification statutes should not be subject to strict scrutiny because the election is judicial. The reasoning in *Wells* is explicitly limited to the concept of apportionment with respect to judicial elections: "The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents." *Wells*, 347 F. Supp. at 455.

Wells is also inapposite because the Commission exercises a traditional executive function. U.S. Const. art. II, § 2. Though the Commission was created in Article III of the Kansas Constitution, which establishes the judicial branch of government, it is more properly an executive entity because the nomination of judges is traditionally an executive function. Therefore, the *Wells* decision lends no support for the notion that the election of Commission members is somehow immune from the commands of the Equal Protection Clause.

B. *Sailors*

The Equal Protection Clause is implicated here even though justices and judges are ultimately appointed, rather than directly elected. The overall nature of the selection process is not determinative of whether Equal Protection has been violated. *Kramer*, 395 U.S. at 629-30. The Equal Protection Clause is implicated by a state election, *id.* at 629; *Sailors*, 387 U.S. at 111, and there is an election here in which "some resident citizens are permitted to participate and some are not," *Kramer*, 395 U.S. at 629. When a state creates an appointive process, the Equal Protection Clause is relevant to how those who make the appointments were selected. *Id.*

The ultimate question in this case is whether, in attempting to utilize the unique knowledge of the resident members of the bar in the process of appointing judges, Kansas may incorporate an election in which only bar members may participate and all non-attorney citizens are excluded. The Supreme Court, in an established line of cases, has held that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." *Hill*, 421 U.S. at 297. Kansas excludes all otherwise qualified citizens from participating in the election of Commission members based upon occupation. Such an exclusion

cannot withstand constitutional scrutiny. *Gray*, 372 U.S. at 380 ("There is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.").

Kramer, for example, involved the direct election of a local school board and the Supreme Court held that the state could not exclude citizens who were otherwise qualified by residency and age from participating. The Court considered it irrelevant for purposes of scrutiny that the board could have been appointed. *Kramer*, 395 U.S. at 628-29. The Supreme Court's analysis would have been unchanged had the board been appointed by an officials who were chosen through an election in which some resident citizens were permitted to participate and others were not. *Id.* at 629. In fact, the Court explicitly anticipated such a situation:

> For example, a city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. Assuming the council were elected consistent with the commands of the Equal Protection Clause, the delegation of power to the mayor would not call for this Court's exacting review. On the other hand, if the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.

Id. If an official is appointed by another official who is not elected consistent with the commands of Equal Protection, then the appointment of that official must be "necessary to promote a compelling state interest." *Id.* at 627.

The Court in *Kramer* further noted that the system would not violate Equal Protection if the school board members were appointed, *because* all qualified voters are permitted to vote for the appointing official. *Id.* at 627 n.7 ("[I]f school board members are appointed . . . [e]ach resident's formal influence is perhaps indirect, but it is equal to that of other residents.") Therefore, these cases expressly apply in instances where the state uses appointment instead of direct election. Such is the arrangement in the selection of judges in Kansas, so that the State must show that the nomination of justices and judges by the Commission, when all non-attorneys are excluded from the election of five of the nine Commission members, passes strict scrutiny.

A hypothetical based on the relevant authorities is illustrative. In *Kramer*, only qualified voters who also either owned real property in the district or had children enrolled in the local public schools were permitted to participate in the election for district school board members. *Kramer*, 395 U.S. at 622. The Supreme Court held that this exclusion warranted close scrutiny under the Equal Protection Clause and was unconstitutional because it excluded otherwise qualified voters from participating in an election in which they had an interest. *Id.* at 626-27. What if, instead of limiting the franchise to land-owners and parents, the state in *Kramer* had established that the school board would be appointed by an entity elected exclusively by land-owners and parents? Surely, the State could not circumvent

the commands of the Equal Protection Clause by delegating authority to other entities in this manner. *Sailors*, 387 U.S. at 108 & n.5.

Sailors is not to the contrary. *Sailors*, 387 U.S. at 111. That case simply held that equal protection was not violated when local school boards of differing populations each appointed one member of the county board. *Id.* at 110-11. This holding, on its face, has no bearing on voter qualifications, but treats only apportionment of representation, which is governed by a distinct line of cases applying equal protection. *Salyer*, 410 U.S. at 730. It is true that there cannot be an unconstitutional voter qualification in the actual appointment of an official, because there is no election to be excluded from *at that level*. This does not mean that equal protection cannot be violated *by that appointment*. The Court simply looks at how the official or entity making the appointment was elected in order to determine whether the commands of equal protection are being respected by the selection system. *Id.* at 111 ("[N]o constitutional complaint is raised respecting that election."); *Kramer*, 395 U.S. at 629-30.

VI. Other Contrary Decisions.

Two federal district courts have considered challenges to similar judicial selection systems in Missouri and Indiana. *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105 (E.D. Mo. 1997) ("*AAVRLDF*"); *Bradley v. Work*, 916 F. Supp. 1446 (S.D. Ind. 1996). The courts

in *AAVRLDF* and *Bradley* made two fundamental errors in the application of the relevant law. The first was the determination of when an election calls for close or exacting scrutiny under the Equal Protection Clause. In *Bradley*, the court determined that Equal Protection scrutiny was not implicated because the state had decided not to make use of a "popular election." *Bradley*, 916 F. Supp. at 1456. According to the court, the election was not "popular" because the state had decided not to open it to all qualified voters.

Kramer and subsequent Supreme Court precedents contradict this conclusion. The Supreme Court in *Kramer* found that "close scrutiny" is required particularly when an election is not opened to all otherwise qualified voters:

> Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

Kramer, 395 U.S. at 626-27 (citations omitted). The court in *Bradley* agreed with the defendants in that case that the commission members "are not selected by popular election and about the nature of the Commission." *Bradley*, 916 F. Supp. at 1456. But it is the nature of the elected entity that determines whether a popular election is required. The court in *AAVRLDF* made the same error when it concluded, citing *Kramer* but without giving any reasoning, that the election involved in that case was not one of "general interest (such as election for a

legislator)" and therefore did not implicate Equal Protection. *AAVRLDF*, 994 F. Supp. at 1128.

Contrary to *AAVRLDF* and *Bradley*, an election does not become one of "special interest" *because* the state is excluding citizens from participating. Rather, *if* the state is excluding citizens from voting in an election, it must either show that the exclusion is necessary to serve a compelling interest or that the election is one of "special interest" such that it need not be open to all qualified voters. *E.g. Hill*, 421 U.S. at 297. Here, Kansas excludes otherwise qualified citizens from voting in an election for the members of the Nominating Commission based upon occupation. *Contra Gray*, 372 U.S. at 380. The State must show that this system survives strict or close scrutiny.

The courts in *AAVRLDF* and *Bradley* also misapplied the "special purpose" exception analysis from *Salyer* and *Ball* in determining that the respective nominating commissions were nominal government entities. The court utilized the standard that "[w]hen a special unit of government is assigned certain narrow functions, affecting a definable group of constituents more than other constituents, limiting the franchise to members of that definable group is proper." *Bradley*, 916 F. Supp. at 1456. The court in *AAVRLDF* made the same error when it determined, without analysis, that the nominating commission at issue there was a "special unit with narrow functions." *AAVRLDF*, 994 F. Supp. at 1128 n.49. But the

commission in Missouri actually had the power to appoint, as well as nominate, justices to their supreme courts.

Conclusion

For the reasons given above, the Voters have stated a cause of action under the Fourteenth Amendment. Kansas Constitution Article III, Section 5(e) and Kansas Statutes Sections 20-119 through 20-123 are all unconstitutional both facially and as applied to the Voters. Therefore, these laws should be declared uncoinstitutional and permanently enjoined so that non-attorney voters in Kansas are no longer excluded from participation in the elections of the members of the Kansas Supreme Court Nominating Commission. The Voters therefore respectfully ask this Court to reverse the District Court's ruling below.

Respectfully submitted,

Dated: January 31, 2011

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Oral Argument Statement

Plaintiffs-Appellants request oral argument in this case. This case involves crucial issues of the right to Equal Protection in the election of public officials. Because of the importance of these issues, a full and thorough consideration of all aspects of the case, including through oral argument, is warranted.

Certificate of Compliance

I hereby certify that this document, including all headings, footnotes, and quotations, but excluding the corporate disclosure statement, table of contents, table of authorities, statement of related cases, statement of oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel, contains 13,369 words, as determined by the word count of the word-processing software used to prepare this document, specifically WordPerfect X4, which is no more than the 14,000 words permitted under Fed. R. App. P. 32(a)(7)(B)(I).

Respectfully submitted,

Dated: January 31, 2011

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Statement of Related Cases

There are no related cases pending in this Court.

Certificate of Service

I hereby certify that on January 31, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery to the following non-CM/ECF participants:

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s/ Stephen Moore

MEMORANDUM DECISION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

ROBERT DOOL, et al.,	)	
	)	
Plaintiffs,	)	**CIVIL ACTION**
	)	
v.	)	No. 10-1286-MLB
	)	
ANNE BURKE, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM DECISION

Introduction

Before the court are the following:

1. Defendants' motion to dismiss (Docs. 19 and 20);

2. Plaintiffs' response (Doc. 23); and

3. Defendants' reply (Doc. 24).

In its memorandum and order of September 14, 2010 (Doc. 18), the court denied plaintiffs' motion for a preliminary injunction. The court was prepared to make a final ruling when the U.S. Court of Appeals for the Ninth Circuit decided Kirk v. Carpeneti, ____ F.3d _____, 2010 WL 3784772 (9th Cir. Sept. 30, 2010). While this court is not obligated to follow decisions of the Ninth Circuit, the facts and legal analysis in Kirk so closely parallel those in this case that the court directed additional briefing. The parties' supplemental memoranda have been filed (Docs. 25 and 26) and the court is now prepared to rule.

The parties and counsel are familiar with the facts, none of which are in dispute, so no useful purpose will be served by an extended factual summary. To the extent it applies here, the court

adopts and incorporates by reference the contents of its memorandum and order of September 14 denying plaintiffs' request for a preliminary injunction.

Applicable Legal Standards

Defendants move to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(6) because plaintiffs fail to state a claim on which relief may be granted. The parties are familiar with the standards pertaining to Rule 12(b)(6). At oral argument counsel agreed that the case can be resolved by application of that rule.[1]

Legal Issues To Be Resolved

Afer carefully reviewing the parties' submissions, it appears that the simplest and most direct route to resolution of the parties' conflicting legal arguments is to decide whether to follow Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994), as plaintiffs urge, or to follow Kirk, as defendants suggest. Obviously, if Hellebust dictates the outcome, this court is obligated to rule for plaintiffs. On the other hand, if Hellebust is not controlling precedent, this court may, but is not required to, give it serious consideration.

Hellebust

Hellebust initially was decided by Judge John Lungstrum of this court. 824 F. Supp. 1511 (D. Kan. 1993). Again, the parties are well-acquainted with the facts so a detailed summary is not necessary. The central issue was how members of the Kansas State Board of Agriculture ("Board") were elected. The group from which Board members were elected was both large and diverse. See 42 F.3d, n.1.

[1]Plaintiffs have filed a motion for summary judgment (Doc. 21), which is appropriate but moot in view of the ruling herein.

But the activities of the Board were even more diverse and far-reaching. Here is the Tenth Circuit's summary:

> Central to its legal conclusion and remedy was the district court's factual finding the Board's reach far extends the fields of agriculture and agribusiness. While the Board insisted the approximately eighty laws which the legislature has entrusted it to enforce are confined to the narrow purposes of the state's agricultural industries, the court found, for example, anyone who pumps gas in Kansas relies on a facility subject to the Board's inspection. "Any commercial pump or scale used in Kansas, such as the ones used to fill cars with gasoline at the local filling station, is subject to inspection by the Board of Agriculture. Kan. Stat. Ann. § 83-206 (Supp. 1992)." Hellebust I at 1514. All meat and dairy inspection is entrusted to the Board whose appointee, the State Dairy Commissioner, has the authority to enter any business premises, conduct inspections, issue subpoenas, and otherwise enforce state regulations on safe dairy and meat products. The Secretary regulates the use of pesticides whether applied to residential lawns or farmlands. The Board's Chief Engineer of the Division of Water Resources controls not only farm and agricultural water uses but also "water rights held by cities, utilities and individuals not connected with agriculture." Id.
>
> With its approximately 330 employees and a budget of about $15 million allocated from the general fund, the district court found the Board "is not simply an agricultural promotion or marketing agency or an entity which deals with matters disproportionately affecting those who elect it. The Board has broad regulatory powers which affect all residents of Kansas daily." Id. at 1513.

Id. at 1332-33.

Judge Lungstrum concluded, after analyzing these functions (and others), that the Board exercised basic, general governmental powers. He held that the statutory procedure of electing Board members violated the Equal Protection Clause. The Circuit agreed:

> Moreover, the constitutional significance of these facts cannot be obscured by the Board's gloss that its powers are limited because it is subject to legislative and executive controls in other areas. The Board's partial dependence on the actions of other state entities does not

> restrict the range of governmental powers it wields. Indeed, in a traditional system in which one branch of government is subject to the checks and balances of another, such dependence is the norm. Consequently, the incidental effect other entities have on the Board does not minimize its authority nor vitiate the requirement for selection reform.
>
> Once a state agency has the authority to affect every resident in matters arising in their daily lives, its powers are not disproportionate to those who vote for its officials. The quality of meat and dairy products consumed by everyone in the state; the accuracy of the scales upon which people are charged for consumer goods; the right to divert and use water; the use of pesticides on residential lawns, city parks, and farmlands are not services disproportionate to those who attend the annual meeting of the Board. Those matters unremittingly influence every person within the State of Kansas. Moreover, as correctly determined by the district court, those matters fall within the state's police powers and comprise part of the normal functions of state government. Thus, although the Board exercises powers that uniquely benefit the agricultural industry, its core governmental powers deprive the Board of the umbra of Ball and Salyer.[2]

Id. at 1334-35.

Plaintiffs argue that defendants have not shown the Ball and Sayler exception to be applicable. They ask this court to look beyond the Commission's function and apply Hellebust because all Kansans, not merely Kansas lawyers, are affected by judicial power of the Kansas Supreme Court and Court of Appeals. This is asking the court to ignore the facts.

The Commission, which exists and functions pursuant to both the Kansas Constitution and Kansas statutes, must be compared to the Board. Otherwise, it makes no sense to consider and apply Hellebust,

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[2]Ball v. James, 451 U.S. 355, 101 S. Ct. 1811, 68 L.Ed.2d 150 (1981) and Salyer Land Co. v. Tulare Lake Basin Water Stor. Dist., 410 U.S. 719, 93 S. Ct. 1224, 35 L.Ed.2d 659 (1973) which create an exception to the "one man-one vote" rule when applied to units of government having a narrow and limited focus which disproportionately affects the few who are entitled to vote.

as plaintiffs clearly want this court to do. As contrasted with the then-Board's myriad duties, supra, the Commission has but one function: to screen applicants to fill vacancies on the Kansas Supreme Court and Court of Appeals. Unless a vacancy exists, the Board does not function. When it does function, it does not select or appoint a justice or judge; it merely selects and forwards to the governor the names of three applicants it deems best qualified. Plaintiffs try to make it sound as if the governor must appoint one of the three applicants. That is not exactly true. If the governor declines to appoint any of the three, the appointment is made from the same list of applicants by the chief justice of the Kansas Supreme Court. But otherwise, the Commission has no duties, functions and powers which "affect all residents of Kansas daily" such as those of the Board. It has no authority over the administrative operation of the Supreme Court or Court of Appeals. It has no power to set the requirements for admission to the Kansas bar, nor does it regulate or supervise the conduct of Kansas attorneys. It is not subject to legislative or executive controls. It has no staff. To be sure, decisions of the Kansas Supreme Court and Kansas Court of Appeals can affect the daily lives of Kansans, but they are judicial decisions, not decisions of the Commission. (Realistically, the daily affairs of Kansas residents are more directly affected by decisions of local courts, whose judges are either appointed or elected, depending on the type and location of the court.)

No useful purpose will be served by further discussion. Essentially for the reasons put forth by defendants, this court finds that Hellebust is both factually and legally distinguishable and

therefore declines to conclude that it controls the outcome of this case. Plaintiffs are free to disagree, of course, and realistically, the Tenth Circuit is best suited to decide whether Hellebust controls.

The court now turns to Kirk because, even if it is not controlling, it is very recent authority involving remarkably similar facts and legal issues.

Kirk

As before, it is unnecessary to make a detailed summary of Kirk. Not only are the lawyers familiar with the decision, the lawyers who represented the plaintiffs in Kirk are the same lawyers who represent plaintiffs here. Kirk involves a challenge to Alaska's "merit selection" system for selection of its judges. Alaska also utilizes a commission established in the Alaska Constitution called the Judicial Council, which is composed of seven members. The chief justice of the Alaska Supreme Court chairs the Council. Three lay members are appointed by the governor and confirmed by the legislature and three lawyer members are appointed by the Alaska Bar Association. Apart from the differences in its makeup, the Judicial Council functions exactly as does the Commission except that the Council holds public hearings with respect to applicants. The similarity is not coincidental. Both are based on the so-called Missouri Plan.

As in this case, the plaintiffs in Kirk sought to enjoin the three attorney members of the Council from participating in the selection process for a new supreme court justice. And as here, their argument was that the appointment of the Council's three lawyer members by the bar association violated the Equal Protection Clause. The Kirk plaintiffs supported their case with essentially the same

authority and arguments as are made here, i.e., that judges (at least at the appellate level) must either be popularly elected or appointed by a popularly elected official, presumably the state's governor. They lost at both the district and appellate level.

In response to this court's request, plaintiffs have identified four reasons why Kirk is not entitled to consideration in this case:

1) The Alaska Judicial Council is appointed rather than elected;

2) Kirk is inconsistent with Hellebust;

3) Kirk is inconsistent with prior Ninth Circuit decisions; and

4) Kirk is inconsistent with Supreme Court Equal Protection jurisprudence.

(Doc. 26). Further discussion of Hellebust is unnecessary and, of course, even if Kirk is inconsistent with other Ninth Circuit cases, there is nothing this court can, or should, do about it. Presumably the Kirk plaintiffs made that argument to the Ninth Circuit. If they didn't, they should have.

Plaintiffs argue that ". . . Kirk turned upon the fact that the Council members are appointed rather than elected," citing pages 16656, 16659 and 16662 of the slip opinion (Doc. 26 at 2). This court has carefully reviewed those pages (as well as the entire opinion). On page 16655 and 56, the Ninth Circuit merely recounted what the district court had done:

> The district court first looked at the overall appointment of judicial nominees, and held that the general "one person, one vote" rule first established in legislative redistricting cases does not apply to judicial elections and appointments. The district court then examined the two

> steps preceding the judicial appointment itself: the election of the Board of Governors by the Alaska Bar Association, and the Board of Governors' appointment of attorney members to the Judicial Council. The district court held that the election of the Board of Governors by the membership of the Alaska Bar Association did not violate the Equal Protection Clause because the election fell within an exception from general election requirements that is recognized for limited purpose entities. It also held that the Board of Governors' selection of the attorney members of the Judicial Council presented no constitutional issue under election law principles because the members of the Judicial Council are appointed, rather than elected.

On page 16659, the Ninth Circuit observed:

> Plaintiffs argued in the district court that the vote denial cases served to invalidate the selection of the members of the Judicial Council. As the district court correctly concluded, however, the right to equal voting participation has no application to the Judicial Council because the members of the Council are appointed, rather than elected. See Rodriguez,[3] 457 U.S. at 9-10, 102 S.Ct. 2194; Sailors v. Bd. of Educ., 387 U.S. 105, 111, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967).

Here is what the district court "correctly concluded":

> Having concluded that the Board's election passes constitutional muster, the next question is whether the Board's selection of the attorney members of the Council violates Equal Protection principles. Plaintiffs urge that there is a violation, but in doing so, they are necessarily imposing on the process a judgment that a public election is necessary for the appointment of judicial officers. Yet, as noted above, the Court specifically held in Sailors that the "one person, one vote" principle does not apply where non-legislative officers are chosen by appointment, rather than by election. Moreover, the delegates to the Alaska Constitutional Convention endorsed and the people of the State of Alaska ratified the proposition that Alaska state judges are to be appointed, rather than elected. Plaintiffs have not cited, nor has this court's research found, any authority in support of the proposition that a state may not appoint, rather than elect, its judiciary. Thus, although "one person, one vote" is not relevant to appointments, this court also finds the analysis by the

[3]Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982)

district judges in Bradley[4] and AAVRLDF[5], which found that judicial selection commissions perform non-traditional governmental functions, persuasive. Here, the Council does not "administer normal functions of government" or "enact laws governing the conduct of citizens; rather, among its responsibilities, the Council is charged with evaluating and recommending the most qualified candidates for Alaska's bench based on its assessment of the credentials of members of the bar being considered for vacant judgeships. In this regard, therefore, the Council is a limited purpose entity whose actions disproportionately affect the membership of the Alaska Bar.

For many of the same reasons supporting the limitation on the Board's election, the selection of the Council's attorney members by the Board is rationally related to a legitimate state interest in selecting well-qualified jurists. Moreover, the Alaska Constitution has included checks on the exercise of the appointment powers in the Plan, which save it from defeat under rational basis review. To begin with, some members of the Board are themselves appointed by the Governor. Second, the Board appoints only three of the seven members of the Council. Any candidate for judicial office must therefore secure the vote of at least one other member of the Council in order to be recommended for appointment. Third, the Council's nominations are subject to a final selection by the Governor. Fourth, every person nominated by the Council and selected by the governor must stand for periodic retention elections in which all registered voters participate. These extensive limitations winnow and ultimately defeat the notion central to Plaintiffs' case that it is a select group of citizens – that is, Alaska lawyers – who actually select the Alaska judiciary and in doing so deprive other citizens of equal rights under the law. Rather, the Plan merely allows the public to draw upon the expertise of Alaska's lawyers in the selection of judicial officers, a justification that is rationally related to a legitimate state interest.

Case No. 09-cv-00136-JWS (Doc. 45 at 21-22, D. Alaska 2009).

Finally, the Ninth Circuit stated on pages 16662-3:

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[4]Bradley v. Work, 916 F. Supp. 1446 (S.D. Ind. 1996)

[5]African-American Voting Rights Legal Defense Fund, Inc. v. Missouri, 994 F. Supp. 1105 (E.D. Mo. 1997)

> Plaintiffs' attempt to characterize Kramer[6], and particularly the footnote 7 sentence referring to equal indirect influence in appointments, as holding that the Equal Protection Clause requires limiting the appointment power to officials who have been popularly elected. They thus contend that Kramer renders the power of Bar-selected Council members unconstitutional. The Kramer footnote does not stand for any such proposition. Kramer illustrated how voters could indirectly influence school board appointments as part of its explanation of why New York's exclusion of certain voters in school board elections was unconstitutional. The Court did not suggest a sweeping new constitutional rule that appointments for all positions in every branch of government must be made by an official who is popularly elected.
>
> In fact, the Supreme Court has already rejected Plaintiffs' far-reaching proposition. In Rodriguez, the Supreme Court considered whether Puerto Rico could delegate to a political party the power to appoint someone to fill an interim vacancy in the Puerto Rico Legislature. 457 U.S. at 3, 102 S.Ct. 2194. Members of the opposing party argued that the appointment mechanism was constitutionally defective because the power to appoint had to be vested in an elected official. Id. at 12, 102 S.Ct. 2194. The Supreme Court disagreed, finding no such constitutional requirement. Id. The Court therefore upheld a regime in which appointments on a temporary basis were made by a body not elected by the "people as a whole."

Having considered the pages cited by plaintiffs, this court is hard-pressed to see how the Ninth Circuit's decision "turned" on appointment as opposed to election of the attorney members of the Council. On the contrary, whether the cited pages are read in isolation or whether the opinion is read as a whole, there is nothing to indicate that either the district court or the Ninth Circuit's decisions would have been for the Alaska plaintiffs had the members of the Council been elected by the members of the bar, as they are in Kansas. This is made clear in the following two paragraphs from the Ninth Circuit's opinion:

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[6]Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969)

> Moreover, even assuming there is some validity to the general proposition Plaintiffs advance, there is no meaningful violation of it here. In this case, the power vested in the Judicial Council is not to make the final appointment, but to nominate persons for judicial selection. The ultimate power to appoint judges is in the Governor, who is popularly elected by the people of Alaska. In addition, the people have the opportunity to reject the appointment in subsequent retention elections.
>
> Alaska is not the only state to give a significant role to attorneys in the merit selection process. Fourteen other states, including Alabama, Hawaii, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, Vermont, and Wyoming, have systems in which (1) the nominating commission includes attorney members who are chosen neither through popular election nor by a popularly elected government official; and (2) the governor of the state must select a candidate nominated by the commission.

Plaintiffs' final argument, that Kirk is "fundamentally inconsistent with Supreme Court Equal Protection Jurisprudence," is answered to some extent by the just-cited portions of the district and appellate court opinions. Plaintiffs argue here that the Ninth Circuit misunderstood or misconstrued their Equal Protection arguments. They say: "But at no time did the Plaintiffs/Appellants in Kirk ever suggest that every appointing official must be directly popularly elected. Rather, Plaintiffs contended that an appointing official may not be elected subject to the same voter qualifications that would be unconstitutional if placed upon the election of the appointed official." (Doc. 26 at 8). This court does not understand plaintiffs' argument any better than, apparently, did the Ninth Circuit. This court is not required to follow decisions of the Ninth Circuit and would not hesitate to disregard Kirk if it is clear that the decision is contrary to Supreme Court precedent. No such clarity

appears from plaintiffs' arguments.[7]

Summary

This court, as did the Ninth Circuit, recognizes that this is but one of several cases ". . . brought by a group of individuals seeking to establish the principle that all participants in the judicial selection process must either be popularly elected, or be appointed by a popularly elected official." (Slip op. at 16647). This court also recognizes that this effort may be somewhat of a "hot topic" based upon reading the various articles cited by the parties here as well as those cited in Kirk. It is not this court's job to weigh in on the debate except to point out that Kansas voters approved the present system and the absence of evidence that Kansas' system has not worked and will not continue to work to ensure that qualified individuals are appointed to the Kansas Supreme Court and the Kansas Court of Appeals.[8]

Conclusion

Defendants' motion to dismiss (Doc. 19 and 20) is sustained.

IT IS SO ORDERED.

Dated this 3rd day of November 2010, at Wichita, Kansas.

s/ Monti Belot

[7]This court notes the Ninth Circuit's comment: "We therefore take this opportunity to publish an opinion dealing with the issues Plaintiffs raise as best as we are able to perceive them." (Slip op. at 16649; emphasis supplied). This court also has experienced some difficulty perceiving plaintiffs' legal arguments.

[8]Yesterday, by margins of 60% or better, Kansas voters retained all four justices of the Kansas Supreme Court who were up for retention.

Monti L. Belot
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JUDGMENT IN A CIVIL CASE

ROBERT DOOL, et. al.,

Plaintiffs,

v Case Number 10-1286- MLB

ANNE BURKE, et. al.,

Defendants.

Pursuant to the Memorandum and Order filed on November 3, 2010, judgment is entered in favor of defendants.

Date: November 3, 2010

TIMOTHY M. O'BRIEN
Clerk of the Court

s/ Robert Moody
Robert Moody, Deputy Clerk

K.S.A. Const. § 5

Kansas Statutes Annotated Currentness
Constitution of the State of Kansas (Refs & Annos)
Bill of Rights
Article 3.—Judicial (Refs & Annos)
§ 5. Selection of justices of the supreme court.

(a) Any vacancy occurring in the office of any justice of the supreme court and any position to be open thereon as a result of enlargement of the court, or the retirement or failure of an incumbent to file his declaration of candidacy to succeed himself as hereinafter required, or failure of a justice to be elected to succeed himself, shall be filled by appointment by the governor of one of three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted to the governor by the supreme court nominating commission established as hereinafter provided.

(b) In event of the failure of the governor to make the appointment within sixty days from the time the names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees.

(c) Each justice of the supreme court appointed pursuant to provisions of subsection (a) of this section shall hold office for an initial term ending on the second Monday in January following the first general election that occurs after the expiration of twelve months in office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any justice of the supreme court may file in the office of the secretary of state a declaration of candidacy for election to succeed himself. If a declaration is not so filed, the position held by such justice shall be open from the expiration of his term of office. If such declaration is filed, his name shall be submitted at the next general election to the electors of the state on a separate judicial ballot, without party designation, reading substantially as follows:

"Shall _____

(Here insert name of justice.)

_____

(Here insert the title of the court.)

be retained in office?"

If a majority of those voting on the question vote against retaining him in office, the position or office which he holds shall be open upon the expiration of his term of office; otherwise he shall, unless removed for cause, remain in office for the regular term of six years from the second Monday in January following such election. At the expiration of each term he shall, unless by law he is compelled to retire, be eligible for retention in office by election in the manner prescribed in this section.

(d) A nonpartisan nominating commission whose duty it shall be to nominate and submit to the governor the names of persons for appointment to fill vacancies in the office of any justice of the supreme court is hereby established, and shall be known as the "supreme court nominating commission." Said commission shall be organized as hereinafter provided.

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(e) The supreme court nominating commission shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.

(f) The terms of office, the procedure for selection and certification of the members of the commission and provision for their compensation or expenses shall be as provided by the legislature.

(g) No member of the supreme court nominating commission shall, while he is a member, hold any other public office by appointment or any official position in a political party or for six months thereafter be eligible for nomination for the office of justice of the supreme court. The commission may act only by the concurrence of a majority of its members.

History: Adopted by convention, July 29, 1859; ratified by electors, Oct. 4, 1859; original subject matter stricken, L. 1957, ch. 234, § 1; new subject matter substituted, L. 1972, ch. 392, § 1; Nov. 7, 1972.

<General Materials (GM) - References, Annotations, or Tables>

REVISOR'S NOTES

1988 Main Volume REVISOR'S NOTES

Original annotations to this section that are now pertinent to article 3, section 2, have been transferred to that section and appear there as annotations Nos. 27 to 34.

Prior to 1958, section related to district courts and district judges.

Vacancies in supreme court. Prior to 1958, see § 11 of this article; from 1958 to 1972, see § 2 of this article.

Election, appointment and terms of office. Prior to 1972, see § 2 of this article.

Supreme court nominating commission. Prior to 1972, see § 2 of this article.

CROSS REFERENCES TO RELATED SECTIONS

1988 Main Volume CROSS REFERENCES TO RELATED SECTIONS

Implementing legislation, see 20-119 to 20-138.

RESEARCH AND PRACTICE AIDS

2009 Pocket Part RESEARCH AND PRACTICE AIDS

Judges 3.

C.J.S. Judges §§ 12 to 14.

LAW REVIEW AND BAR JOURNAL REFERENCES:

2009 Pocket Part LAW REVIEW AND BAR JOURNAL REFERENCES:

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"Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit," Mark D. Hinderks and Steve A. Leben, 31 W.L.J. 155, 187 (1992).

ATTORNEY GENERAL'S OPINIONS

1988 Main Volume ATTORNEY GENERAL'S OPINIONS

Judicial; supreme court nominating commission; open meetings act. 82-254.

Qualifications of members of supreme court nominating commission. 87-65.

2009 Pocket Part ATTORNEY GENERAL'S OPINIONS

Supreme court nominating commission; applicability of title 7; 1964 civil rights act, Americans with disabilities act and Kansas acts against discrimination. 93-69.

District judicial nominating commission members; prohibition against holding office in political party. 94-165.

Supreme court nominating commission; prohibition against members holding public office by appointment. 95-68.

Supreme court nominating commission; questions posed to applicants for appellate court positions; age, marital and family status, religious affiliation and mental health. 97-29.

CASE ANNOTATIONS

1. Cited; non-lawyer remaining on supreme court nominating commission following issuance of temporary permit to practice law examined. State ex rel. Stephan v. Adam, 243 K. 619, 622, 760 P.2d 683 (1988).

Current through 2009

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West's Kansas Statutes Annotated Currentness
Chapter 20. Courts
➡ Article 1. Supreme Court
➡ **20-101. Court of record; jurisdiction; administrative authority; duties of chief justice**

The supreme court shall be a court of record, and in addition to the original jurisdiction conferred by the constitution, shall have such appellate jurisdiction as may be provided by law; and during the pendency of any appeal, on such terms as may be just, may make an order suspending further proceedings in any court below, until the decision of the supreme court. As provided by section 1 of article 3 of the Kansas constitution, the supreme court shall have general administrative authority over all courts in this state, and the supreme court and each justice thereof shall have such specific powers and duties in exercising said administrative authority as may be prescribed by law. The chief justice shall be the spokesman for the supreme court and shall exercise the court's general administrative authority over all courts of this state. The chief justice shall have the responsibility for executing and implementing the administrative rules and policies of the supreme court, including supervision of the personnel and financial affairs of the court system, and delegate such of this responsibility and authority to personnel in the state judicial department as may be necessary for the effective and efficient administration of the court system.

20-101a. Original jurisdiction in legislative apportionment cases

The supreme court shall have original and exclusive jurisdiction in regard to any suit in law or equity, or any controversy relating to the apportionment of representation in the legislature of the state of Kansas.

20-102. Terms

The supreme court shall meet at the state capital on the first Tuesday in January and July in each year. Special and adjourned terms of the court may also be held at such times as a majority of the judges may direct; but notice of the time of the holding of such special or adjourned terms shall be given by publication in the Kansas register.

20-103. Adjournments

If a majority of said court should not be in attendance on the first day of the term, the clerk shall enter such fact on record, and the court shall stand adjourned till the succeeding day, and so from day to day for three days; and if said court shall not be opened within three days, all matters pending therein shall stand continued until the next term, unless a special term be sooner ordered, and no action or matter shall abate or be discontinued thereby.

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20-104. Records and papers

The records and papers of the supreme court shall be kept at the seat of government, in a suitable room to be provided for the accommodation of the court, and not be removed therefrom unless by direction of the court, and then only so long as the court may permit.

20-105. Qualifications of justices

No person shall be qualified to hold the office of justice of the supreme court, unless such person shall have been regularly admitted to practice law in the state of Kansas and has engaged in the active and continuous practice of law, as a lawyer, judge of a court of record or any court in this state, full-time teacher of law in an accredited law school or any combination thereof for a period of at least ten (10) years prior to the date of appointment as justice.

20-106. Marshal; powers; oath

The supreme court may, on special occasions, when necessity shall require, appoint a marshal, who shall have power to serve processes, and shall perform such other duties as may be required of him by the court or enjoined by law; he shall take the usual oath of office.

20-107. Process; fees

All process or writs issuing out of the supreme court shall be directed to the sheriff or other proper officer of the county where the same is to be executed, who shall serve the same: *Provided,* That the marshal of said court shall have power to serve any such order, warrant, notice or citation issuing out of said court, and shall receive the same fees therefor as other officers are entitled to for like services.

20-108. Carrying out appellate court judgments and decrees by district courts

An appellate court of this state may require the district court of the county where any action or proceeding shall have originated to carry the judgment or decree of the appellate court into execution; and the same shall be carried into execution by proper proceedings, by such district court, according to the command of the appellate court made therein.

20-109. Clerk; oath; fees

Before entering on the duties of his office, the clerk of the supreme court shall take and subscribe the oath of office; and the clerk shall receive, in addition to the fees already prescribed, such per diem during the term as may be allowed by said court.

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20-110. Duties of clerk

It shall be the duty of the clerk of the supreme court to enter of record all orders, judgments, decrees and proceedings of the court, and to issue all process required by law or ordered by the court, and perform such other duties as may be required of him by the court or by law.

20-111. Syllabus of case

When a case is decided by the supreme court, the judge delivering the opinion shall, at the time the decision is made, file with the clerk a brief statement, in writing, of the points decided in the case, which shall constitute the syllabus in the published reports of the case.

20-112. Written opinions

The opinion of the court shall in all cases as soon as practicable be reduced to writing, and filed in the cause to which it relates, and a copy thereof be returned with the mandate to the court below.

20-113, 20-114. Repealed by Laws 1953, ch. 375, § 95

20-113, 20-114. Repealed by Laws 1953, ch. 375, § 95

20-115. Fees to state general fund

All fees accruing after the passage of this act shall be the property of the state of Kansas, and when collected shall be turned over to the general-revenue fund of the state, the same as above provided.

20-116. Supplies; requisitions

All supplies, blank forms, books and stationery used in the office of the clerk of the supreme court shall be provided as heretofore, except each requisition for such supplies shall be signed and approved by the chief justice of the supreme court.

20-117, 20-118. Repealed by Laws 1951, ch. 242, § 1

20-117, 20-118. Repealed by Laws 1951, ch. 242, § 1

20-119. Supreme court nominating commission; selection of chairperson

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The member who is to be chairperson of the supreme court nominating commission shall be selected in the following manner: The clerk of the supreme court, in March of any year in which the chairperson is to be elected by members of the bar, shall send by ordinary first-class mail to all members of the bar eligible to vote a notice that such election is to be held and advising how nominations for such office may be made. Any member or group of members of the bar resident of and licensed to practice law in Kansas, may, on or before April 1, file in writing by mail or otherwise, in the office of the clerk of the supreme court, a nomination in writing accompanied by the written consent of the nominee, of a qualified individual for such office. After the nominations have been made the clerk of the supreme court, on or before May 1, shall send by ordinary first class United States mail to each of the members of the bar who are residents of and licensed to practice law in Kansas, a list of all the names and places of residence of the qualified nominees together with a ballot, in such form as may be prescribed by the such clerk, for voting upon such nominees.

Each member of the bar receiving such ballot may cast one vote thereon for one of the nominees named and shall return the ballot by mail in time to be received by the clerk on or before May 15. All ballots received at the office of the clerk by such date shall be counted and the nominee receiving the greatest number of votes cast shall be the chairperson member of such commission, except that if there are more than two nominees and no one of them receives a majority of the votes cast, the names of the two receiving the greatest number of votes shall be resubmitted for vote by ballot in like manner as is prescribed for the first ballot. Such second ballot to be mailed on or before June 15, and voted and returned so as to be received at the office of the clerk on or before July 1.

20-120. Same; selection of member from each congressional district

The members of the supreme court nominating commission to be chosen from among the members of the bar of each congressional district shall be selected in the following manner: The clerk of the supreme court, in March of any year in which a member of the commission is to be elected by members of the bar, shall send by ordinary first-class mail to all members of the bar eligible to vote for the member to be elected a notice that such election is to be held and advising how nominations for such office may be made. Any member or group of members of the bar resident of the congressional district and licensed to practice law in Kansas may, on or before April 1, file in writing by mail or otherwise in the office of the clerk of the supreme court, a nomination accompanied by the written consent of the nominee, of a qualified individual who resides in the same congressional district, as member of the commission from that district. After the nominations have been made the clerk, on or before May 1, shall send by ordinary first class United States mail to each of the members of the bar who are residents of the congressional district and licensed to practice law in Kansas, a list of all the names and places of residence of the qualified nominees for that district, together with a ballot in such form as the clerk may prescribe, for voting upon such nominees.

Each member of the bar receiving such ballot may cast one vote thereon for one of the district nominees named and shall return the ballot by mail in time to be received at the office of the clerk on or before May 15. All ballots received at the office of the clerk by such date shall be counted by congressional districts and the nominee in each district receiving the greatest number of votes cast in the district shall be a member of the commission from that district, except that if in any district there are more than two nominees and no one of them receives a majority of the votes cast in the district, the names of the two receiving the greatest number of

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votes shall be resubmitted in the district for vote by ballot in like manner as is prescribed for the first ballot. Such second ballot to be mailed on or before June 15 and returned in time so as to be received at the office of the clerk on or before July 1.

20-121. Same; tie votes resolved by lot

In any election held for selection of the chairman or other members of the commission to be selected by the members of the bar, in case no nominee receives a majority of the votes cast on the first ballot and two (2) or more are tied for either the first highest or the second highest number of votes cast so as to leave unsettled the determination of the question of which two (2) have received the highest number of votes, or if on either the first or second ballot two (2) nominees are tied so that one (1) additional vote cast for either would give him a majority, the canvassers shall resolve the tie by lot in such manner as they shall adopt and the winner of the lot shall be deemed to have the plurality or majority as the case may be.

20-122. Same; names and addresses of attorneys; certificate evidencing qualifications and voting; separate envelopes; preservation of ballots and certificates

The clerk of the supreme court may use the roster of attorneys in the clerk's office licensed to practice law in Kansas for ascertaining the names and places of residence of those entitled to receive ballots and for ascertaining the qualifications of those nominated for membership on the commission. The clerk shall supply with each ballot distributed a certificate to be signed and returned by the member of the bar voting such ballot, evidencing the qualifications of such member of the bar to vote, and certifying that the ballot was voted by the certifying voter.

To the end that the vote cast may be secret a separate envelope shall be provided for the ballot, in which the voted ballot only shall be placed, and the envelope containing the voted ballot shall be returned in an envelope, also to be supplied by the clerk, together with the signed certificate. No ballot not accompanied by the signed certificate of the voter shall be counted. When the voted ballots are received by the clerk they shall be separated from the certificates by the canvassers, and after the ballots are counted and the results certified both the ballots and the certificates shall be preserved by the clerk for a period of six months and no one shall be permitted to inspect them except on order of the supreme court. At the end of such six months period the clerk, unless otherwise ordered by the supreme court, shall destroy them.

20-123. Same; record of election and appointment to commission; notification; meetings; rules and regulations

When the chairperson and other members of the commission chosen by the members of the bar have been elected, and after the names of the nonlawyer members appointed by the governor have been certified to the clerk of the supreme court as provided in this act, the clerk shall make a record thereof in the clerk's office and shall notify the members of the commission of their election and appointment. The commission shall meet from time to time as may be necessary to discharge the responsibilities of the commission. Such meetings

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shall be held at such place as the clerk of the supreme court may arrange. Such meeting shall be held upon the call of the chairperson, or in the event of the chairperson's failure to call a meeting when a meeting is necessary, upon the call of any four members of the commission. The commission shall act only at a meeting, and may act only by the concurrence of a majority of its members. The commission shall have power to adopt such reasonable and proper rules and regulations for the conduct of its proceedings and the discharge of its duties as are consistent with this act and the constitution of the state of Kansas.

20-124. Same; appointment of nonlawyer members; vacancies

As terms of office of nonlawyer members from each congressional district are about to expire, their successors shall be appointed by the governor and the names of such appointees certified by the governor to the clerk of the supreme court before their terms of office begin. Any vacancy occurring among the nonlawyer members of the commission shall be filled by appointment by the governor within 10 days after the governor has notice of such vacancy, for the unexpired term of the member whose place is being filled, and the name of such appointee shall be certified to the clerk. All appointments by the governor shall be without regard to the political affiliations of the appointees.

20-125. Same; terms of office

The term of office of the chairperson of the commission shall be for as many years as there are, at the time of such chairperson's election, congressional districts in the state. Except for those appointed to fill vacancies all terms of office for members of the commission, elected or appointed, shall be for as many years as there are, at the time of their election or appointment, congressional districts in the state.

20-126. Same; uncontested elections

In any uncontested election, the nominee shall be declared elected without preparation of a ballot.

20-127. Same; change in status affecting membership; vacancies

If the chairman or any other members of the commission elected by the members of the bar shall cease to be a member of the bar entitled to engage in the general practice of law in Kansas, or if the chairman shall change his place of residence from the state or if any other member of the commission, whether elected or appointed, shall change his place of residence to a congressional district other than that from which he was elected or appointed, the chairman or such other member as to whom such change of condition exists, shall no longer be a member of the commission and a vacancy shall exist as to his membership.

20-128. Same; appointment by chief justice to fill vacancy of lawyer member, when; certification

Any vacancy occurring from any cause in the office of chairman of the commission or among the lawyer

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members from the congressional districts shall be filled by appointment by the chief justice of the supreme court of Kansas, such appointee to hold office until the first day of July following the expiration of four months after such appointment is made. During the four months immediately preceding the termination of such appointive term an election shall be held in the manner by this act provided for other elections of subsequent members of the commission, for the unexpired term, if any, of the member whose vacancy is being filled. Appointments to fill such vacancies shall be certified to the clerk of the supreme court.

20-129. Same; congressional redistricting; effect; staggered terms

In the event of redistricting which changes the number of congressional districts in the state, the members of the commission as constituted at the time of redistricting shall continue to be members of the commission until the first day of July following the expiration of four months after such redistricting becomes effective. Except for the chairperson on such date, the terms of all members of the commission shall expire. During the four months immediately preceding such termination of office, new commissioners shall be elected and appointed from the newly constituted congressional districts in the same manner which is provided in this act for election and appointment of commissioners. The terms of elected and appointed members first chosen from such newly constituted districts shall be staggered on the basis of the number of such districts and their successors shall be elected and appointed in such manner and for such terms as provided in this act.

20-130. Same; canvassers of elections; duties

The canvassers at any election held pursuant to this act shall consist of the clerk of the supreme court and two (2) or more persons who are members of the bar residing in Kansas, either practicing lawyers, justices or judges, designated to act as such by the chief justice. The canvassers shall open and canvass the ballots and shall tabulate and sign the results as a record in the office of the clerk.

20-131. Same; additional term for members

Any member of the commission shall be eligible for reelection or reappointment if otherwise qualified, but for not more than one (1) term in addition to that for which he was originally elected or appointed.

20-132. Same; vacancies in supreme court; notification of chairman; nominations by commission

When a vacancy occurs in the supreme court the clerk of such court shall promptly notify the chairman of the commission of such vacancy. When it is known that a vacancy will occur at a definite future date, but the vacancy has not yet occurred, the clerk shall notify the chairman of the commission thereof, and the commission may, within sixty (60) days prior to the occurrence of such vacancy, make its nominations and submit to the governor the names of three (3) persons nominated for such forthcoming vacancy. To the end that the administration of justice may be facilitated and that no vacancy on the supreme court may be permitted to exist unduly, the commission shall make its nominations for each vacancy and certify them to the governor as promptly as possible, and in any event not later than sixty (60) days from the time such vacancy occurs.

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20-133. Same; intent of act; powers and duties of commission

It is the intent of this act that the members of the commission shall consist only of those persons whose purpose it will be to recommend for appointment on the supreme court only lawyers or judges of recognized integrity, character, ability and judicial temperament, and whose conduct will conform to the letter and the spirit of the constitutional amendment implemented by this act. The commission shall take cognizance of the fact that the best qualified nominees may be those whom it would be most difficult to persuade to serve. Accordingly the commission shall not limit its consideration to persons who have been suggested by others or to persons who have indicated their willingness to serve. The commission may, if it sees fit to do so, tender nominations to one or more qualified persons, prior to and subject to the formal action of the commission in making its nominations, in order to ascertain whether such person will agree to serve if nominated.

20-134. Same; withdrawal of nominations and substitution of names, when

After the commission has nominated and submitted to the governor the names of three (3) persons for appointment to fill a vacancy on the supreme court, any name or names may be withdrawn for cause deemed by the commission to be of a substantial nature affecting the nominee's qualifications to hold office, and another name or names may be substituted therefor at any time before the appointment is made to fill such vacancy. If any nominee dies or requests in writing that his name be withdrawn the commission shall nominate another person to replace him. Whenever there are existing at the same time two (2) or more vacancies and the commission has nominated and submitted to the governor lists of three (3) persons for each of such vacancies, the commission may, in its sole discretion and before an appointment is made, withdraw the lists of nominations, change the names of any of such persons nominated from one (1) list to another and resubmit them as so changed, and may substitute a new name for any of those previously nominated. Action of a commission in withdrawing nominations may be taken at the same meeting at which the nominations were made, or at any later meeting.

20-135. Same; appointments by chief justice, when

In the event of the failure of the governor to make the appointment within sixty days from the time names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees. Any change in names made pursuant to K.S.A. 20-134 shall constitute a resubmission.

20-136. Same; acquisition of supplies and equipment

The clerk of the supreme court is hereby authorized to procure such supplies and equipment as may be necessary to carry out the provisions of this act.

20-137. Same; compensation of members; expenses

Each member of the commission shall receive as compensation for his services the sum of fifteen dollars ($15)

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each day of attendance at meetings of the commission and shall be reimbursed for his necessary traveling, hotel, and sustenance expenses in connection with said meeting.

20-138. Same; compensation and expenses; expenses of judicial nominating commission members and clerk

The compensation and expenses of the supreme court nominating commission, the expenses of the members of a district judicial nominating commission and the compensation of the clerk, and clerk's expenses for supplies, equipment, and clerical and other assistance necessary to carry out the provisions of this act, including official hospitality and any expenses and clerical assistance necessary to perform the clerk's duties with respect to the nonpartisan selection of judges, shall be paid from available funds. The director of accounts and reports is hereby authorized to draw warrants for the use and purposes specified in this section upon the presentation of vouchers duly itemized and approved by the clerk of the supreme court.

20-139. Conferences of supreme court justices and certain judges; expenses

From time to time, the chief justice of the Kansas supreme court may order conferences of justices of the supreme court and judges of the district court and court of appeals on matters relating to the administration of justice. The actual and necessary expenses of the justices of the supreme court and judges of the district court and court of appeals incurred in connection with attending such conferences shall be paid, subject to the provisions of K.S.A. 75-3216.

20-140 to 20-144. Repealed by Laws 1965, ch. 212, § 6

20-140 to 20-144. Repealed by Laws 1965, ch. 212, § 6

20-146. Repealed by Laws 1975, ch. 178, § 32

20-147. Repealed by Laws 1975, ch. 178, § 32

20-148. Repealed by Laws 1975, ch. 178, § 32

20-149, 20-150. Repealed by Laws 1975, ch. 178, § 32

20-149, 20-150. Repealed by Laws 1975, ch. 178, § 32

20-151. Repealed by Laws 1976, ch. 145, § 246

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20-152. Judicial study advisory committee; appointment; expenses

The supreme court may appoint a judicial study advisory committee to assist in conducting the judicial study and survey and to make recommendations to the judiciary and the legislature. The judicial study advisory committee shall be considered a regular committee of the judicial council for the purpose of receiving per diem allowances.

20-153. Same; supplies, clerical assistance, contracts; duties of judicial administrator; staff services of coordinating council

The judicial council is authorized to procure such supplies and fix compensation of such clerical and other assistance, and enter into contracts for employment of such consulting and technical groups, as may be necessary to carry out the provisions of this resolution. Under direction of the supreme court, the judicial administrator shall participate in the judicial survey and study and shall cooperate with the judicial council in this project. Upon request of the chief justice, the legislative coordinating council may make available such of the council's staff services as may be necessary to assist the chief justice in the preparation of any legislation necessary to implement any recommended statutory changes resulting from the survey and study.

20-154. Same; use of judicial council and supreme court funds for matching purposes for study and survey

Any funds appropriated by the legislature to the judicial council or the supreme court may be used to match any moneys available from federal or private sources to assist in the conduct of the judicial survey and study.

20-155. Supreme court law library; law librarian and other personnel

There is hereby established the Kansas supreme court law library, which shall provide law library services to the judicial, legislative and executive branches of state government and to members of the bar under such rules as the supreme court may prescribe. The Kansas supreme court law library shall be under the supervision and control of the Kansas supreme court. For the purpose of operating and managing such library a state law librarian shall be appointed by and serve at the pleasure of the supreme court. Within the limits of appropriations made therefor, the state law librarian shall, with the approval of the supreme court, appoint such assistants and other personnel as required for the operation and management of the law library, in accordance with the personnel plan of the supreme court. The state law librarian and the librarian's assistants and other library personnel shall receive compensation in accordance with the pay plan of the supreme court. Before entering upon the duties of the office, the state law librarian shall take the oath of office prescribed by law for public officers.

20-156. Same; operation and management; classification and cataloguing of materials; procurement of legal publications of other jurisdictions; exchange, sale or loan of library materials; duplicate law book fund

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The state law librarian shall be responsible for the operation and management of the supreme court law library and shall have custody of all books, pamphlets and documents belonging thereto. He shall cause each book, pamphlet or document received by such library to be stamped with the words “Kansas supreme court law library” and to be classified and catalogued in accordance with approved library methods. The state law librarian shall provide for the procurement of the acts, journals and other publications of a legal nature of the congress and the legislatures of the several states and territories, together with the judicial decisions of the courts of the United States and of the several states and territories. For such purpose, the state law librarian may exchange the laws, judicial decisions and books, documents and publications of a legal nature of the state of Kansas and agencies thereof. The law librarian may exchange, sell or loan indefinitely, duplicate books, sets of works or other duplicate or temporary material, and the proceeds from any such sales shall be remitted by the state law librarian to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the “duplicate law book fund,” which fund is hereby created. All expenditures from such fund shall be for miscellaneous law library purposes and shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the state law librarian or by a person or persons designated by him. Any exchange, sale or loan made hereunder shall be exempt from the provisions of K.S.A. 75-3739 to 75-3744, and amendments thereto.

20-157. Same; transfer of certain publications, books, records and accounts from state library

All books, pamphlets and documents of a legal nature now deposited with and the property of the Kansas state library and under the supervision and control of the state law librarian shall be transferred to and shall become the property of the Kansas supreme court law library. All books, records and accounts involving the sale of Kansas reports, advance sheets, court of appeals reports and reports and proceedings of the Wyandotte constitutional convention, together with records of the state law library report fund, shall be transferred by the state librarian to the custody and control of the state law librarian.

20-158. Budget for judicial branch of state government; preparation; submission

The chief justice of the supreme court shall be responsible for the preparation of the budget for the judicial branch of state government, with such assistance as the chief justice may require from the judicial administrator, the chief judge of the court of appeals and the chief judge of each judicial district. Each district court and the court of appeals shall submit their budget requests to the chief justice in such form and at such time as the chief justice may require. The chief justice shall submit to the legislature the annual budget request for the judicial branch of state government for inclusion in the annual budget document for appropriations for the judiciary. Such budget shall be prepared and submitted in the manner provided by K.S.A. 75-3716 and 75-3717 and amendments thereto. Such budget shall include the request for expenditures for retired justices and judges performing judicial services or duties under K.S.A. 20-2616 and amendments thereto as a separate item therein.

20-159. Reproduction and preservation of court records; minimum standards

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The supreme court may provide for and authorize any chief judge of a judicial district, to photograph, microphotograph or otherwise reproduce or to have photographed, microphotographed or otherwise reproduced any of the court records, papers or documents which are by law placed in the courts of that judicial district and to acquire necessary facilities and equipment and to acquire, maintain and use all such appropriate containers, files and other methods as shall be necessary to accommodate and preserve the photographs, microphotographs, films or as otherwise reproduced. The photographing, microphotographing, filming or otherwise reproducing may be so authorized for the reproducing of court records, where to do so will promote efficiency in the office, or as a method of preserving old or worn records, papers or documents. The photographic films and prints or reproductions therefrom, shall comply with federal standard no. 125a, dated April 24, 1958, or the latest revision thereof, issued pursuant to the federal property and administrative services act of 1949, and amendments thereto. The device used to reproduce such records on for any type of storage shall be one which accurately reproduces the original thereof in all details. The court may use reproduction methods which include the digital storage and retrieval of official court records.

20-160. Court may adopt rules relating to court records

The supreme court may adopt rules to govern the reproduction, preservation, storage and destruction of court records of this state, not inconsistent with this act.

20-161. Supreme court to establish pay plan, personnel plan and affirmative action plan for certain nonjudicial personnel; contents of plans; copy submitted to legislature

The supreme court shall establish for the nonjudicial personnel of the supreme court and the court of appeals a formal pay plan, a personnel plan and an affirmative action plan for the hiring of minority persons. Such pay plan and personnel plan shall include, but not be limited to, job descriptions, qualifications of employees, salary ranges, vacation, sick and other authorized leave policies. A copy of such pay plan, personnel plan and affirmative action plan shall be submitted to the legislature on or before January 15, 1978.

20-162. Supreme court to establish judicial personnel classification system; contents; submission to legislative coordinating council

(a) The supreme court shall establish by rule a judicial personnel classification system for all nonjudicial personnel in the state court system and for judicial personnel whose compensation is not otherwise prescribed by law. Said personnel classification system shall take effect on July 1, 1979, and shall prescribe the compensation for all such personnel. No county may supplement the compensation of district court personnel included in the judicial personnel compensation system. Such compensation shall be established so as to be commensurate with the duties and responsibilities of each type and class of personnel. In establishing the compensation for each type and class of personnel, the supreme court shall take into consideration: (1) The compensation of such personnel prior to January 1, 1979; (2) the compensation of personnel in the executive branch of state government who have comparable duties and responsibilities; and (3) the compensation of similar personnel in the court systems of other states having comparable size, population and characteristics.

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(b) The following personnel shall not be included in the judicial personnel classification system:

(1) County auditors,

(2) coroners,

(3) court trustees and personnel in each trustee's office, and

(4) personnel performing services in adult or juvenile facilities used as a place of detention or for correctional purposes.

The compensation for the above personnel shall be paid by the county as prescribed by law.

(c) The judicial personnel classification system also shall prescribe the powers, duties and functions for each type and class of personnel, which shall be subject to and not inconsistent with any provisions of law prescribing powers, duties and functions of such personnel.

(d) In conjunction with the judicial personnel classification system, the supreme court shall prescribe a procedure whereby personnel subject to said classification system who are removed from office by their appointing authority will have an opportunity to seek reinstatement.

(e) On or before December 1, 1978, the supreme court shall submit to the legislative coordinating council a detailed personnel classification and pay plan for district court employees that are to be included in the judicial personnel classification system. The plan shall detail each individual position by classification, pay grade and pay step as compared to the employee's present salary. In assignment of positions to particular steps within the assigned pay grade, the plan shall place each employee at the step which is the next highest over the employee's current salary. If an employee is earning more than the highest step on a given grade, his or her salary shall remain at the current level.

20-163. Official station, justices and court of appeals judges

(a) The official station of each justice of the supreme court and judge of the court of appeals shall be the county seat of the county where the justice or judge maintains an actual abode in which the justice or judge customarily lives.

(b) The chief judge of the judicial district in which a justice of the supreme court or judge of the court of appeals has the justice's or judge's official station, shall provide suitable office space upon request by the justice or judge for use by the justice or judge and the justice's or judge's staff personnel. Such office space shall be in or adjacent to the district court courtrooms and offices at the official station of the justice or judge. Notwith-

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standing the foregoing provisions, no office space shall be provided by the chief judge of the third judicial district.

(c) Each justice of the supreme court and judge of the court of appeals, upon appointment and from time to time thereafter as changes occur, shall notify the judicial administrator in writing of the justice's or judge's official station, if other than the city of Topeka.

(d) Notwithstanding the other provisions of this section, all mileage and other allowances for official travel for justices of the supreme court and judges of the court of appeals shall be determined from Topeka, Kansas.

20-164. Rules establishing expedited process for support, parenting time and child visitation orders

(a) The supreme court shall establish by rule an expedited judicial process which shall be used in the establishment, modification and enforcement of orders of support pursuant to the Kansas parentage act; K.S.A. 23-451 et seq., 39-718a, 39-755, 60-1610, and amendments thereto, or K.S.A. 39-718b, and amendments thereto; K.S.A. 38-2243, 38-2244 or 38-2255, and amendments thereto; or K.S.A. 23-4,105 through 23-4,118 and amendments thereto; or K.S.A. 23-4,125 through 23-4,137, and amendments thereto.

(b) The supreme court shall establish by rule an expedited judicial process for the enforcement of court orders granting visitation rights or parenting time.

20-165. Rules establishing child support guidelines

The supreme court shall adopt rules establishing guidelines for the amount of child support to be ordered in any action in this state including, but not limited to, K.S.A. 38-1121, 39-755 and 60-1610, and amendments thereto. In adopting such rules, the court shall consider the criteria in K.S.A. 38-1121.

20-166. Access to justice fund; expenditures; grant guidelines established by the supreme court

(a) There is hereby created in the state treasury the access to justice fund. Money credited to the fund pursuant to K.S.A. 20-362, and amendments thereto, shall be used solely for the purpose of making grants for operating expenses to programs, including dispute resolution programs, which provide access to the Kansas civil justice system for persons who would otherwise be unable to gain access to civil justice. Such programs may provide legal assistance to pro se litigants, legal counsel for civil and domestic matters or other legal or dispute resolution services provided the recipient of the assistance or counsel meets financial qualifications under guidelines established by the program in accordance with grant guidelines promulgated by the supreme court of Kansas.

(b) All expenditures from the access to justice fund shall be made in accordance with appropriations acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the chief justice of the Kansas supreme court or by a person or persons designated by the chief justice.

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(c) The chief justice may apply for, receive and accept money from any source for the purposes for which money in the access to justice fund may be expended. Upon receipt of each such remittance, the chief justice shall remit the entire amount to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the access to justice fund.

(d) Grants made to programs pursuant to this section shall be based on the number of persons to be served and such other requirements as may be established by the Kansas supreme court in guidelines established and promulgated to regulate grants made under authority of this section. The guidelines may include requirements for grant applications, organizational characteristics, reporting and auditing criteria and such other standards for eligibility and accountability as are deemed advisable by the supreme court.

20-167. Supervision fee for juvenile offender; fees paid to county general fund; waiver

On and after July 1, 1997:

(a) The supreme court may establish a supervision fee schedule to be charged a juvenile offender, or the parent or guardian of such juvenile offender, if the juvenile offender is under the age of 18, for services rendered the juvenile who is:

(1) Placed on probation;

(2) placed in juvenile community correctional services;

(3) placed in a community placement;

(4) placed on conditional release pursuant to K.S.A. 38-2374, and amendments thereto; or

(5) using any other juvenile justice program available in the judicial district.

(b) The supervision fee established by this section shall be charged and collected by the clerk of the district court.

(c) All moneys collected by this section shall be paid into the county general fund and used to fund community juvenile justice programs.

(d) The juvenile offender shall not be eligible for early release from supervision unless the supervision fee has been paid.

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(e) An annual report shall be filed with the commissioner of juvenile justice from every judicial district concerning the supervision fees. The report shall include figures concerning: (1) The amount of supervision fees ordered to be paid; (2) the amount of supervision fees actually paid; and (3) the amount of expenditures and to whom such expenditures were paid.

(f) The court may waive all or part of the supervision fee established by this section upon a showing that such fee will result in an undue hardship to such juvenile offender or the parent or guardian of such juvenile offender.

20-168. Seal of justice for supreme court courtroom; replica of seal in supreme court chamber in capitol; gifts and donations, disposition; assistance by secretary of administration

In addition to the other purposes for which expenditures may be made from the moneys appropriated from the state general fund or from any special revenue fund, the supreme court may make expenditures to acquire and install a seal of justice in the supreme court courtroom of the judicial center that is designed to be a replica of the seal of justice in the supreme court chamber in the state capitol, which has represented thereon a hand holding the scales of justice and inscriptions reading “Supreme Court” and “State of Kansas” and which is affixed above the entrance behind the former bench for the justices. The supreme court is hereby authorized to accept gifts and donations to pay for the cost of obtaining and installing such seal of justice. All monetary gifts and donations received for this purpose shall be deposited in the state treasury to the credit of the judicial branch gifts fund of the judicial branch. The secretary of administration shall provide such assistance as may be requested by the supreme court for the purposes of acquiring and installing such seal of justice as provided by this section.

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