

Nos. 21-124378-S and 22-125084-S (consolidated)

FILED
MAR 11 2024
DOUGLAS T. SHIMA
CLERK OF APPELLATE COURTS

IN THE SUPREME COURT OF THE STATE OF KANSAS

**LEAGUE OF WOMEN VOTERS OF KANSAS; LOUD LIGHT; KANSAS
APPLESEED CENTER FOR LAW AND JUSTICE; TOPEKA INDEPENDENT
LIVING RESOURCE CENTER; CHARLEY CRABTREE; FAYE HUELSMANN;
and PATRICIA LEWTER**

Plaintiffs-Appellants

v.

**SCOTT SCHWAB, in his official capacity as Kansas Secretary of State; and
KRIS KOBACH, in his official capacity as Kansas Attorney General**

Defendants-Appellees

**DEFENDANTS-APPELLEES' MOTION FOR EXPLANATION OF
JUSTICE DAN BILES' RESCISSION OF RECUSAL**

Appeals from the Kansas Court of Appeals Opinions (June 17, 2022 and March 17, 2023)

Appeal from the District Court of Shawnee County, Kansas
Honorable Teresa Watson, District Judge
District Court Case No. 2021-CV-000299

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TO: The Honorable Justice Dan Biles (or, in the alternative, the full Court, as appropriate):

Defendants Scott Schwab and Kris Kobach move, both reluctantly and respectfully, for an explanation of Justice Dan Biles' recent rescission of his prior recusal in this now-consolidated appeal. After Justice Biles had earlier recused himself from this appeal, the Supreme Court issued an Order on February 19, 2024 – the day before a follow-up oral argument – announcing that Justice Biles had “rescinded” his prior recusal and would now fully “participate in the hearing and decision of this case.” Exhibit A (2/19/2024 Order). Neither Justice Biles nor the Court offered any explanation for the decision to rescind the recusal. Under both governing case law and the Code of Judicial Conduct, however, the litigants and the public were entitled to an explanation. Justice Biles' re-entry into the case without providing any public rationale for why the basis for his disqualification no longer existed was improper, has the potential to compromise the public's confidence in the integrity and impartiality of the Court, and creates at least an appearance of impropriety.

I. – BACKGROUND

A. Appeal No. 124378

The appellate proceedings in this case have proceeded on two tracks. In Appeal No. 124378, Plaintiffs appeal the denial of their motion for a preliminary injunction on various claims challenging the facial constitutionality of K.S.A. 25-2438, a statute targeting the impersonation of election officials. Shortly after filing their notice of appeal in this matter, Plaintiffs moved to transfer the case from the Court of Appeals to the Supreme Court. This Court denied that motion in a written Order dated October 18, 2021, and expressly noted therein that Justice Biles was “not participating” in the decision. *See* Exhibit B (10/18/2021

Order). After the Court of Appeals subsequently dismissed Plaintiffs' appeal for lack of standing and Plaintiffs petitioned for review in this Court, this Court's Order granting that petition confirmed that Justice Biles was "recused."¹ *See* Exhibit C (8/26/2022 Order). The Court later issued an additional Order on January 10, 2023, before the first Supreme Court oral argument in the case, noting: "The Honorable Dan Biles recuses from this appeal and will not participate in the hearing and decision of this case." Exhibit D (1/10/2023 Order). And the Court continued to note Justice Biles' recusal in a series of procedural rulings. *See* Exhibits E-F (Orders dated 8/29/2022, 6/29/2023).

B. Appeal No. 125084

In Appeal No. 125084, Plaintiffs appeal the denial of the district court's dismissal of their facial constitutional attacks on certain signature verification requirements in K.S.A. 25-1124(h) and ballot collection restrictions in K.S.A. 25-2437(a). This Court is currently reviewing the Court of Appeals' reversal of the district court's decision.

Until recently, Justice Biles recused himself from this appeal as well. When the Court first granted Defendants' Petition for Review from an adverse ruling of the Court of Appeals, its Order expressly noted that Justice Biles was not participating. *See* Exhibit I (6/23/2023 Order). When the Court later denied the Plaintiffs' motion for an injunction pending resolution of the appeal, the Court's Order again noted that Justice Biles was not participating. *See* Exhibit J (7/28/2023 Order).

¹ The Court appears to use the terms "not participating" and "recused" interchangeably. On multiple occasions, after having previously announced that Justice Biles was "recused," the Court issued Orders simply noting that he was "not participating." Compare, for example, Exhibits C, D, E, and F with Exhibits B, G, and H.

Yet when the case came to oral argument in November 2023, Justice Biles appeared on the bench and participated in the case. This occurred with no advance notice to the parties and no explanation as to whether and/or why his recusal status had changed.

C. The Now-Consolidated Appeals

A few weeks after the November 2023 oral argument in Appeal No. 125084, the Court issued an opinion in Appeal No. 124378, reversing the Court of Appeals on the question of standing. *See* Exhibit G (relevant excerpts from 12/15/2023 Opinion). The last page of the decision reiterated that Justice Biles was not participating. The same notation also appeared in a separate Order issued later the same day requiring the parties to show cause why the two appeals should not be consolidated. *See* Exhibit H (12/15/2023 Order). Neither party opposed consolidation. So the two appeals were merged and set for a third oral argument on February 20, 2024. A day before that argument, the Court then issued an Order announcing, without further explanation, that Justice Biles had rescinded his prior recusal and would fully participate in the adjudication of the now-consolidated appeal. *See* Exhibit A. And he did indeed participate in the consolidated oral argument.

II. – ARGUMENT

It is a core principle of judicial ethics that “one who acts in a judicial capacity is disqualified to hear any matters concerning which he may be biased or prejudiced, or in which he may have an interest.” *Flannery v. Flannery*, 203 Kan. 239, 241, 452 P.2d 846 (1969). Consequently, the Kansas Code of Judicial Conduct directs that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” Kan. Sup. Ct. R. 601B, Canon 2, Rule 2.11(A). The relevant focus is not on

the subjective views of the judge or movant. Rather, the critical consideration is whether the judge’s disinterest, impartiality, and independence might be reasonably questioned “in the mind of a reasonable person with knowledge of all the circumstances.” *State v. Walker*, 283 Kan. 587, 608, 153 P.3d 1257 (2007) (internal quotation omitted).

Justice Biles never articulated any public explanation for his original recusal. The parties are thus unaware of what motivated his decision to step back from the case. To be clear, a judge is generally not obligated to explain the basis for a recusal. Since the judge’s conflict or potential appearance of impropriety becomes irrelevant once the recusal occurs, no potential prejudice accrues to any party or the public from the court’s decision not to elucidate the specific rationale for recusal.²

But the same cannot be said when a judge decides to rescind a prior recusal and reenter the case. Comment 5 to Rule 2.11(C) in Canon 2 of the Kansas Code of Judicial Conduct dictates that “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.” Given that Justice Biles believed, over multiple years in this case, that he either harbored some type of conflict, or that his participation might implicate an appearance of impropriety, thereby necessitating his disqualification, it is hard to see how his decision to reverse that

² Rule 2.11(C) in Canon 2 does provide that “[a] judge subject to disqualification . . . , other than for bias or prejudice . . . may disclose on the record the basis for the judge’s disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification.” If the parties agree that the judge should not be disqualified, then the judge may continue presiding over the case.

recusal does not require a public explanation so that the parties can assess whether further relief should be sought.

The importance of such explanation would be true in any case, but it is particularly acute in a politically charged case such as this one, on a subject where a significant portion of the public is already skeptical of government institutions. “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). In this context, the opacity of Justice Biles’ recusal reversal does not help. *See* Kan. Sup. Ct. R. 601B, Canon 1, Rule 1.2, Comment 3 (“Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary.”); *El Fenix de P.R. v. The M/Y Johanny*, 36 F.3d 136, 142 n.7 (1st Cir. 1994) (pointing out that values undergirding disqualification rule not only safeguard “the litigants’ constitutional entitlement to an unbiased adjudication,” but also “promote public confidence in the impartiality of the judicial process”).

Defendants are unaware of any reported cases—not just in Kansas, but in the whole country—in which a judge has rescinded a prior disqualification without the record containing some sort of explanation as to the basis for the earlier disqualification. Some jurisdictions do not allow a judge to reverse a prior disqualification at all.³ The majority

³ In Louisiana, for example, once “a trial judge recuses himself or herself from a case, the trial judge may not take any further action in that case, including that of rescinding the prior order of recusal.” *Tatum v. Orleans Parish Sch. Bd.*, 894 So.2d 1180, 1181 (La. Ct. App. 2005). So, too, in Florida. *See Florida v. Schack*, 617 So.2d 832, 833-34 (Fla. Dist. Ct. App. 1993).

of jurisdictions though, including Kansas, are more flexible. They hold that “a judge may rescind a recusal *where valid grounds appear on the record.*” *Luce v. Cushing*, 868 A.2d 672, 677 (Vt. 2004) (emphasis added); *id.* at 677-78 (collecting cases). But neither the Kansas Supreme Court, nor any other appellate court as far as we can tell, has ever endorsed a wholly *sub silentio* recusal reversal. Before a disqualification can be vacated, there must be some explanation introduced into the record as to *why* the prior recusal is no longer necessary. See *Flannery*, 203 Kan. at 240, 242-43 (upholding district judge’s decision to reverse prior disqualification where record revealed that recusal was predicated on existence of a parallel case, which had been finally adjudicated at time of reversal).

State v. Sawyer, 297 Kan. 902, 305 P.3d 608 (2013), is instructive. The Court there underscored the importance of closely scrutinizing a judge’s decision to rescind an earlier recusal. The district judge in that dispute opted to preside over the case after having previously disqualified himself in a prior prosecution involving the same defendant. When the case reached the Supreme Court, the Court found it important that the trial judge “had already judged himself unable to rule impartially in the earlier prosecution.” *Id.* at 910. Even though the district judge determined that circumstances had changed such that he had no need to recuse himself from the second case, this Court disagreed and concluded “that the probability of actual bias in this case was ‘too high to be tolerable under the Due Process Clause.’” *Id.* at 912 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)).

Lest there be any doubt here, Defendants are not suggesting any specific bias or conflict on the part of Justice Biles. Nor could they reasonably do so at this time: they (like the public at large) have no insight at all into the rationale for Justice Biles’ original

disqualification from these appeals. Given that neither the parties nor the attorneys have changed in this case, and all of the entities are non-profit organizations in which there can be no financial ownership, Defendants have no obvious way to discern what motivated Justice Biles' earlier recusal and, more importantly, whether the relevant circumstances have changed such that disqualification is no longer appropriate.

The relief that Defendants request here is modest. They ask only that Justice Biles explain on the record the basis for his original recusal and articulate what conditions have changed that would permit a reversal of that earlier decision. Defendants believe that either Justice Biles or the Court has a legal duty to provide such an explanation. But whether legally mandated or not, Defendants submit that providing this transparency is essential to ensuring the public's confidence in the fairness, integrity, and impartiality of these proceedings.

Respectfully submitted,

/s/ Anthony J. Powell

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CERTIFICATE OF SERVICE

I certify that on March 11, 2024, I arranged for the foregoing document to be hand-served with the Clerk of the Court, which in turn caused electronic notifications of such filing to be sent to all counsel of record. I also certify that a true and correct copy of the above will be e-mailed to the following individuals, as authorized by Administrative Order 2023-RL-077.

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/s/ Anthony J. Powell
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IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT,
KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.,
and TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, In His Official Capacity as Kansas Secretary of State,
and DEREK SCHMIDT, In His Official Capacity as Kansas Attorney General,
Appellees.

FILED

FEB 19 2024

DOUGLAS T. SHIMA
CLERK OF APPELLATE COURTS

ORDER

The Honorable Dan Biles plans to participate in the hearing and decision of this case. The January 10, 2023, order of recusal is rescinded.

Dated this 19th day of February 2024.

FOR THE COURT



MARLA LUCKERT
Chief Justice

EXHIBIT

A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS,
LOUD LIGHT,
KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and
TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, in his official capacity as Kansas Secretary of State, and
DEREK SCHMIDT, in his official capacity as Kansas Attorney General,
Appellees.

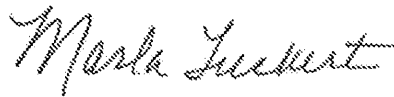
ORDER

The court has considered and denies Appellants' motion to transfer this appeal for final consideration under Supreme Court Rule 8.02 (2021 Kan. S. Ct. R. 53). Appellants' motion to expedite included within the motion to transfer is denied as moot. See also Supreme Court Rule 5.01(a) (2021 Kan. S. Ct. R. 31) ("Each motion must contain only a single subject.").

All responses are noted.

Dated this 18th day of October 2021.

FOR THE COURT



MARLA LUCKERT,
Chief Justice

Biles, J., not participating

EXHIBIT

B

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT,
KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and
TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, in his Official Capacity as Kansas Secretary of State, and
DEREK SCHMIDT, in his Official Capacity as Kansas Attorney General,
Appellees,

ORDER

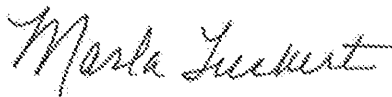
The court grants Appellants' petition for review and notes Appellees' response.

The court denies Appellants' motion to expedite and notes Appellees' response to the motion.

The court notifies the parties that it will not grant an extension of the supplemental briefing schedule under Supreme Court Rule 8.03(i)(3) (2022 Kan. Ct. R. at 59) absent a showing of an exceptional circumstance. Workload alone does not constitute an exceptional circumstance.

Dated this 26th day of August 2022.

FOR THE COURT



MARLA LUCKERT, Chief Justice

Biles, J., recused.

EXHIBIT

C

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT,
KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.,
and TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, In His Official Capacity as Kansas Secretary of State,
and DEREK SCHMIDT, In His Official Capacity as Kansas Attorney General,
Appellees.

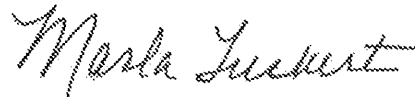
ORDER

The Honorable Dan Biles recuses from this appeal and will not participate in the hearing and decision of this case.

The court does not plan to assign a judge to participate in Justice Biles' place.

Dated this 10th day of January 2023.

FOR THE COURT



MARLA LUCKERT
Chief Justice

EXHIBIT

D

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS,
LOUD LIGHT,
KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.,
and
TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, in his Official Capacity as Kansas Secretary of State,
and
DEREK SCHMIDT, in his Official Capacity as Kansas Attorney General,
Appellees,

ORDER

The court denies on present showing the following pending notice and motions:

- Notice of Withdrawal under Rule 1.09(c) of Attorney Spencer McCandless, filed in this court on August 17, 2022;
- Motion for Admission Pro Hac Vice of Mollie DiBrell, filed in this court on August 16, 2022; and,
- Motion for Admission Pro Hac Vice of Marisa A. O'Gara, filed in this court on August 16, 2022.

See Supreme Court Rule 1.09(c) (2022 Kan. S. Ct. R. at 8) (requiring service of notice of withdrawal on withdrawing attorney's client); Supreme Court Rule 1.10(d)(1)(D) (2022 Kan. S. Ct. R. at 10) (requiring service of motion for admission pro hac on out-of-state attorney's client); Rule 1.10(e)(1)(C) (requiring verified application to include applicant's residence address); Supreme Court Rule 1.11(a) (2022 Kan. S. Ct. R. at 11) (directing

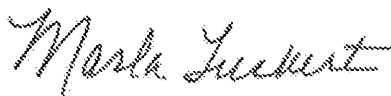
EXHIBIT

E

that service under our appellate rules is subject to K.S.A. 60-205); K.S.A. 2021 Supp. 60-205(b)(2)(F) (permitting service by electronic means "when authorized by supreme court. . . rule"); Supreme Court Rule 1.11(b) (2022 Kan. S. Ct. R. at 12) (authorizing service by electronic means via transmission of "Notice of Electronic Filing" only on attorneys registered as electronic filing users in Kansas).

Dated this 29th day of August 2022.

FOR THE COURT

A handwritten signature in cursive script that reads "Marla Luckert".

MARLA LUCKERT
Chief Justice

Biles, J., recused

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS,
LOUD LIGHT,
KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC.,
and
TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, in his Official Capacity as Kansas Secretary of State,
and
DEREK SCHMIDT, in his Official Capacity as Kansas Attorney General,
Appellees,

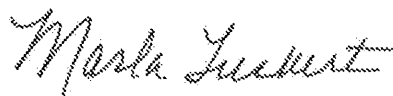
ORDER

The court orders that no later than July 19, 2023, the parties must file supplemental briefs addressing what effect, if any, the decision in *Counterman v. Colorado*, No. 22-138, ___ U.S. ___, 2023 WL 4187751 (June 27, 2023), has on this case.

The parties may file responsive supplemental briefs no later than ten days after the opposing party's supplemental brief is filed. The court will not grant an extension of these deadlines absent a showing of exceptional circumstances. Workload, alone, is not an exceptional circumstance. The court will not permit reply briefs.

Dated this 29th day of June 2023.

FOR THE COURT



MARLA LUCKERT
Chief Justice

Biles, J., recused

EXHIBIT

F

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR
LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State, and KRIS W.
KOBACH, in His Official Capacity as Kansas Attorney General,
Appellees.

SYLLABUS BY THE COURT

1.

Under Kansas' traditional, two-part standing test, a party must demonstrate they have suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct. A party establishes a cognizable injury—i.e., an injury in fact—when they suffer some actual or threatened injury as a result of the challenged conduct.

2.

An allegation of future injury can satisfy the injury-in-fact component in a pre-enforcement challenge if there is a threatened impending, probable injury. Plaintiffs need not expose themselves to liability or prosecution before suing to challenge the basis for the threat. Rather, plaintiffs can satisfy the injury-in-fact component when they allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.

we think the answer must be yes. The statute simply does not provide clarity that truthful speech which generates an innocent or unreasonable listener mistake is outside of its scope. And this is sufficient to confer pre-enforcement standing.

Thus, when the Legislature criminalizes speech and does not—within the elements and definitions of the crime—provide a high degree of specificity and clarity demonstrating that the only speech being criminalized is constitutionally unprotected speech, the law is sufficiently unclear to confer pre-enforcement standing on a plaintiff challenging the law. As such, and accepting appellants' well-pled facts as true, we conclude appellants have standing to pursue their challenge of K.S.A. 25-2438(a)(2)-(3). We caution, however, that our holding today does not pronounce any definitive interpretation or construction of K.S.A. 25-2438(a). We limit today's opinion to the broader question of standing.

The Court of Appeals erred in dismissing appellants' claims for lack of standing. Accordingly, we vacate the Court of Appeals' opinion and remand this matter to the Court of Appeals for further proceedings.

BILES, J., not participating.

ROSEN and STANDRIDGE, JJ., concur in the result only.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, *Appellants,*

v.

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FILED
DEC 15 2023

DOUGLAS T. SHIMA
CLERK OF APPELLATE COU

ORDER

The court hereby shortens the time in this case for filing a motion for rehearing or modification under Supreme Court Rule 7.06(a) (2023 Kan. S. Ct. R. at 51). A party must serve and file any motion for rehearing or modification under Rule 7.06 by no later than noon on December 29, 2023. The court will not grant an extension of this deadline.

The court stays the directive in our opinion that remands this case to the Court of Appeals until the expiration of this deadline for a motion for rehearing or modification and pending our ruling on any motion for rehearing or modification. At the conclusion of the motion for rehearing or modification process, the court intends to transfer this appeal from the Court of Appeals back to the Supreme Court on its own motion under K.S.A. 20-3018(c) and order the parties to show cause why the court should not consolidate this case with Case No. 125,084, *League of Women Voters of Kansas, et al. v. Scott Schwab, et al.*

Dated this 15th day of December 2023.

FOR THE COURT



MARLA LUCKERT, Chief Justice

Biles, J., not participating.

EXHIBIT
H

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 125,084

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR
LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

v.

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KOBACH, in His Official Capacity as Kansas Attorney General,
Appellees.

ORDER

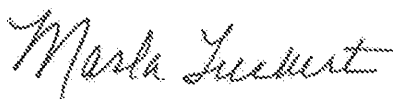
The court grants Appellees' petition for review and notes Appellants' response and Appellees' reply.

The court denies as moot Appellants' Motion to Expedite Petition for Review and notes Appellees' response.

The court notifies the parties that it will not grant an extension of the supplemental briefing schedule under Supreme Court Rule 8.03(i)(3) (2023 Kan. S. Ct. R. at 59) absent a showing of an exceptional circumstance. Workload alone does not constitute an exceptional circumstance.

Dated this 23rd day of June 2023.

FOR THE COURT



MARLA LUCKERT, Chief Justice

Biles, J., not participating.

EXHIBIT

I

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 125,084

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR
LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER,
Appellants,

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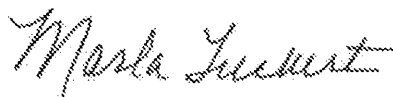
ORDER

The court denies Appellants' Motion for an Injunction Pending Resolution of Appeal. The court does not have the necessary factual findings in the case to rule on the motion for injunction.

The court notes Appellees' response.

Dated this 28th day of July 2023.

FOR THE COURT



MARLA LUCKERT,
Chief Justice

Biles, J., not participating.

EXHIBIT

J