Appeal No. 11-106870-S

IN THE SUPREME COURT OF KANSAS

IN THE MATTER OF	**:**	
	:	**DA10088 and DA10598**
PHILLIP D. KLINE, **Respondent.**	**:**	
	:	

MOTION OF RESPONDENT PHILLIP D. KLINE FOR THE RECUSAL OF JUSTICE CAROL A. BEIER AND OF CHIEF JUSTICE LAWTON NUSS WITH REQUEST FOR ORAL ARGUMENT

Respondent Phillip D. Kline, former Attorney General the State of Kansas, hereby moves for the recusal of Justice Carol A. Beier and of Chief Justice Lawton Nuss from any further participation in this case. Specifically, Mr. Kline moves for:

(1) The recusal of Justice Carol A. Beier for her deep-seated antagonism against Mr. Kline, most notably displayed in her caustic and deceptive opinion in *Comprehensive Health of Planned Parenthood v. Kline*, 287 Kan. 372, 197 P.3d 370 (2008) (hereinafter cited as *CHPP v. Kline*); and

(2) The recusal of Chief Justice Nuss because of Mr. Kline's role in reporting conduct that led to a disciplinary sanction for the Chief Justice in 2006.

Attached to this motion and incorporated herein by reference is the *Affidavit of Phillip D. Kline in Support of Motion for Recusal*. Mr. Kline's Affidavit provides a concise summary of relevant facts, many of which are already in the record, and some of which are not. Mr. Kline requests oral argument on this motion.

PART ONE:
RECUSAL OF JUSTICE CAROL BEIER

I. Overview

A. The CHPP opinion

"A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Kansas Code of Judicial Conduct R. 2.11(A).[1] Justice Beier's untenable *CHPP v. Kline* opinion cannot be reconciled with the neutrality that is required for a court charged with presiding over the final stage of a proceeding with punitive and potentially permanent consequences for a lawyer.

To preview, the Court and Justice Beier's opinion in *CHPP v. Kline* did the following:

- Entertained an unprecedented and meritless mandamus action filed by attorneys for the target of a criminal investigation (Planned Parenthood) seeking to have the evidence of serious crimes taken from the prosecuting attorney (Mr. Kline) and given back to the criminal target;

- Granted Attorney General Paul Morrison (Mr. Kline's successor in office) the right to intervene in Planned Parenthood's mandamus action even though Morrison's claim for relief was limited to a request that Mr. Kline provide him with a set of medical records that his office already possessed and the request was clearly designed to stop a legitimate criminal investigation in its tracks;

- Ordered that the entire *CHPP v. Kline* case be conducted under seal, including a secret trial hidden from public scrutiny in which the criminal target was able to utilize extraordinary discovery rights outside the parameters of the pending criminal case;

[1] Prior to March 1, 2009, former Rule 601A had a comparable provision. "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Canon 3(E)(1).

- Ordered that discovery be obtained from Mr. Kline and his staff in a manner that served well the shared goals of Morrison and Planned Parenthood, but was detrimental to Mr. Kline's investigation into the crimes of Planned Parenthood, including Planned Parenthood's failure to report child sexual molestation;

- Used (and misused) the evidence obtained during the secret discovery and trial to support the very ethics attack against Mr. Kline that is now before this Court;

- Wrote an opinion that (1) perpetuated Planned Parenthood's fabricated theme that Mr. Kline had somehow mishandled the redacted medical records of women and young girls who had abortions in Kansas; (2) accused Mr. Kline, contrary to all of the evidence before the Court, of depriving Morrison's office of access to investigation files that Mr. Kline gathered while Attorney General; and (3) demeaned and denigrated Mr. Kline on political and other grounds not relevant to the relief sought;

- Granted meaningless relief to Morrison by requiring Mr. Kline to produce medical records to Morrison that Morrison already possessed for an investigation that Morrison had long since terminated;

- Granted additional relief, labeled as a "sanction," against Mr. Kline, requiring him to provide to Attorney General Morrison copies of all records that Mr. Kline had obtained as Johnson County District Attorney *after* he vacated the Attorney General's office, all of which could only serve Planned Parenthood in its defense of its felonious conduct and none of which were ever going to be used by Morrison to actually prosecute crimes or to protect sexually abused children;

- Continued the tactic of publicly threatening Mr. Kline with ethical charges or contempt citations in a most injudicious way;

- Biased the disciplinary process against Mr. Kline by referring the tainted *CHPP v. Kline* opinion to this Court's Disciplinary Administrator, who then prosecuted the charges against Mr. Kline.

For these and other reasons grounded in due process, as articulated in more detail below, Mr. Kline submits that recusal of Justice Beier is necessary in the interest of

justice and also to prevent irrevocable damage to public confidence in the honesty and integrity of this Court.

B. Public Response

In the annals of strange judicial opinions, few compare to *CHPP v. Kline*. Writing for a majority of the Court in a highly publicized case that drew national attention against the background of high-tension abortion politics in Kansas, Justice Beier fashioned an opinion with appalling distortions of the fact record to cast Mr. Kline in the worst possible light, all to support relief and "sanctions" that were (1) otherwise unavailable under the normal rule of law, (2) unnecessary as a matter of fact, and (3) unjustified as a matter of law.

Justice Beier's demeaning attack on Kline and his lawful investigations were noted by her colleagues on the Court, by objective legal commentators, and in the mainstream press. Chief Justice McFarland separated herself from Justice Beier's CHPP opinion because of its departure from the rule of law, also observing that the novel "sanction" imposed in the opinion was "a platform from which [the court] can denigrate Kline . . . ." Some reactions from outside of the Court were similar. The writer of the *Kansas Supreme Court Blog* , himself a lawyer, noted that the Court ruled "almost entirely in Kline's favor" while characterizing Justice Beier's tone as "scathing throughout the opinion. She dislikes Kline and wants you to know it." Former Secretary of KDHE (1995-1997), James O'Connell, characterized Justice Beier's opinion as "politically oriented, gratuitous and spiteful comments [ ] unworthy of the state's highest

court." Associated Press correspondent John Hanna queried whether the same Court that had so criticized Kline could "would make the final judgment on any punishment?"

However, most of the mainstream press misinterpreted Justice Beier's opinion as a defeat for Kline, with most state and local headlines conveying that very message while missing the point that Kline had won the case. This post-opinion press coverage is addressed in more detail below, but the important point for this recusal issue is that Justice Beier's *CHPP* opinion was, by all appearances, the implementation of her personal philosophy that supports using the media as a "tool" for effecting changes in law and culture. Justice Beier may believe what she wishes, but she disqualifies herself when she uses high judicial office to promote her personal social agenda while attacking politically-disfavored attorneys in contravention of the rule of law.

II. A Justice with an Agenda: Carol Beier and Third-Wave Feminism

Justice Carol Beier's ideology as a "third-wave feminist" is relevant to the recusal issue and to most of what follows in this memorandum.[2] For those unfamiliar with the etiology of feminism, the first wave were the original suffragists, whose efforts culminated in the Nineteenth Amendment.[3] The second wave were the equal rights

[2] *See generally*, Carol A. Beier & Larkin E. Walsh, *Is What We Want What We Need, and Can We Get It in Writing? The Third-Wave of Feminism Hits the Beach of Modern Parentage Presumptions*, 39 U. BALT. L.F. 26 (2008).

[3] First-wave feminists generally opposed abortion as a form of male exploitation. *See* Mary Catherine Wilcox, *Why the Equal Protection Clause Cannot Fix Abortion Law*, 7 AVE MARIA L. REV. 307, 328-29 (2008).

activists of the 60's and 70's, advocates for equality in the workplace and the bedroom.[4] The third wave, with which Justice Beier identifies, are the daughters of the second wave, born in the 1960's and entering adulthood in the 1980's.[5] They came of age at a time when access to the workplace and to the abortion doctor was the norm. See *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion) (arguing that since *Roe v. Wade*, 410 U.S. 113 (1973), abortion as back-up contraception has become the social norm, facilitating the equality of women in the workplace).

As a third-wave feminist, Justice Beier criticized the traditional roles of husband and wife as "separate spheres ideology."[6] The second-wave of the American feminist movement, she wrote, "identified the rigid gender roles of separate spheres ideology as the potential—and choice-throttling oppressions they were."[7] Commenting on the "positive power and individualism that are the hallmarks of feminism's third-wave," Beier viewed the family as a mere contractual relationship, where parties are free to elect "the family structure they desire" unrestricted by "gender-based presumptions" of an

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[4] *See* Barbara Ann White, *Traversing 2nd and 3rd Waves: Feminist Legal Theory Moving Forward*, 39 U. BALT. L.F. *i*, *iv* (2008) (distinguishing first-wave from second-wave).

[5] *See* White, *supra* note 4, at *vi* (describing the third wave as children of the second wave). Born in 1958, Justice Beier graduated from law school in 1985. *Carol Beier Profile*, GEORGETOWN LAW, http://www.law.georgetown.edu/wlppfp/USProgram/Alumni/1986-87/Beier.html (last visited Mar. 19, 2012).

[6] Beier & Walsh, *supra* note 2, at 27. *See also id.* (stating that the nuclear family is the foundation of an ideology of biological destiny)

[7] *Id.*

obsolete age.[8] Abortion access and "reproductive rights" are a central theme of this philosophy.

Justice Beier recognizes that accomplishing her goals requires radical reform of traditional culture. "This freedom would not be possible," Beier wrote, "but for the deconstruction of Victorian separate spheres family life accomplished during the second-wave. The gender determinism from that ideology had to be attacked and destroyed."[9] As a legal professional, Justice Beier desires to incorporate this third-wave ideology into law. To that end, she endorsed manipulation of the media to create supporting "cultural infrastructure." She explains:

> Bridget Crawford posits that the third-wave's reclamation of feminism through engagement with the media is powerful "cultural work," that may be a necessary pre-condition to an evolution in the law, and she predicts that "third-wave engagement with culture may be a precursor to the law's adoption of some third-wave feminist ideas." In essence, the thesis is that *the media are tools to produce cultural infrastructure, without which even the best intentioned and artfully designed legal reforms are ineffective*.[10]

Such strategies are common in our nation's political culture but are improper motivations for legal opinions authored by a Supreme Court Justice. Justice Beier certainly has every right to her beliefs, but her opinions for the Court should be guided by fact and law, not political or cultural objectives. The lack of factual and legal support for

[8] Beier & Walsh, *supra* note 2, at 37.

[9] *Id.*

[10] *Id.* at 33 (emphasis added).

Justice Beier's opinion in *CHPP v. Kline*, when viewed against the backdrop of her own extrajudicial writing, gives a reasonable person pause as to her objectivity in this matter.

The factual distortions in Justice Beier's opinion for the Court in *CHPP v. Kline* laid the foundation for a blistering condemnation of Mr. Kline and the design of relief and sanctions otherwise unavailable. Although Mr. Kline won the case on the merits, Justice Beier's systematic misrepresentation of the record obscured this fact and created a contrary and prevailing public impression that he was the wrongdoer—a result contrary to law and fact but in harmony with the strategy of using the media as "tools to produce cultural infrastructure" in aid of feminist legal objectives.[11] If Justice Beier perceives Mr. Kline as a standard bearer of "gender determinism ideology," who must be "attacked and destroyed" in order to protect abortion, her opposition to his prosecutorial efforts comes into focus. Unwittingly, Mr. Kline found himself in the center of Justice Beier's war on culture.

III. Abortion Politics in Kansas and The Role Played by Phill Kline in Enforcing Kansas Abortion Law

Phill Kline took office as Kansas Attorney General in January, 2003. Eight months later, Governor Kathleen Sebelius—a vigorous abortion rights advocate—chose Carol Beier to serve as a justice of the Kansas Supreme Court. Early in 2003, Mr. Kline began an investigation of child abuse reporting to determine if sexual predators were using

[11] Justice Beier has a journalism background. "Carol graduated from KU with a journalism degree in 1981 and worked as a newspaper reporter and editor before earning her law degree from KU in 1985." *A Judge with Exceptional Qualifications*, JUSTICE CAROL BEIER, http://www.justicebeier.com.

abortion clinics to destroy evidence of their crimes. (Except for married couples, Kansas law criminalized all intercourse with children under sixteen.) After discovering that Kansas abortion providers almost never reported underage abortion as child abuse, Ex. 20 (Affidavit of Tom Williams), Mr. Kline sought a subpoena for records of underage abortions.[12] In the process of investigating mandatory reporting, he also discovered that the abortion providers engaged in sham reporting of late-term abortions, using boilerplate language on mandatory state forms that required by law particular justifying detail.[13] He also, therefore, sought to subpoena late-term abortion records. Judge Richard Anderson, an objective and neutral magistrate, found probable cause to believe the clinic records of Dr. George Tiller and Planned Parenthood contained evidence of criminal activity and issued the subpoenas. *See* Exs. U4 & V4 (ordering abortion providers to respond to subpoenas for medical records).

Mr. Kline's decision to enforce Kansas abortion law set up a looming clash with Kansas' abortion providers and, it turns out, Justice Beier. The ensuing legal battle resulted in three lengthy opinions, all written by Justice Beier.[14] The effect of these cases

[12] Judge Richard Anderson, after finding probable cause to believe the records would contain evidence of crimes, in October 2004 subpoenaed ninety records from Dr. Tiller's clinic in Wichita and CHPP in Overland Park.

[13] The abortion reporting agency, the Kansas Department of Health and Environment (KDHE), did not enforce the late-term informational requirements, viewing itself as simply a filing agency. As a result, Kansas had become the Wild West of late-term abortion. A law which required specific medical justifications for late-term abortions was boldly disregarded. *See* Kan. Stat. Ann. § 65-6703. Until Mr. Kline's enforcement initiative, Kansas late-term abortion law was a dead letter.

[14] *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006); *Comprehensive Health of Planned Parenthood v. Kline* [*CHPP v. Kline*], 287 Kan. 372, 197 P.3d 370 (2008); and *State v.*

was to hamper Mr. Kline's effort to protect children from sexual abuse, to frustrate and delay legitimate investigations, and seriously to hinder the prosecution of criminal activity by Kansas abortion providers.

IV. The *Alpha* Case: Running the Clock and Other Obstructions

In the first case, the two largest abortion clinics in the state—Planned Parenthood in Kansas City and Women's Health Care Services in Wichita—teamed up to seek a writ of mandamus from the Kansas Supreme Court to prevent Attorney General Kline from obtaining subpoenaed patient records. Filed on October 26, 2004, the case was not argued until September 8, 2005. Because of the two-year statute of limitations for criminal prosecutions in effect at the time, Mr. Kline had requested expedited consideration by this Court. Any crimes relating to the 2002 records were being lost to prosecution each day the court delayed. However in April, 2005, the Legislature, at Mr. Kline's initiative, extended the statute of limitations for such crimes from two to five years, thus saving the investigation from timing out.[15] The new five-year limitations period took effect July 1, 2005.[16] As of year-end, any records pertaining to abortions performed in 2002 and the first half of 2003 could not be used—lost to court delay. The passage of time with the

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Comprehensive Health of Planned Parenthood [*State v. CHPP*], 291 Kan. 322, 241 P.3d 45 (2010).

[15] Kan. Stat. Ann. § 21-3106(4) (2005).

[16] Act of Apr. 18, 2005, 2005 Kan. Laws Ch. 162, § 6.

subpoenas suspended also made evidence harder to gather and prevented the State from protecting child victims because of inability to access their names.[17]

This Court finally ruled—on February 6, 2006— that the clinics could redact the records of both adult and child patient-identifying information prior to producing them, thereby hamstringing the prosecutor in identifying child abuse victims.[18]

When first seeking the subpoenas, Mr. Kline proposed that Judge Anderson remove all adult identifying patient information from the abortion records prior to their being provided to Mr. Kline's office. Mr. Kline could proceed with his investigation without knowing the identity of adult patients.[19] Judge Anderson agreed with this approach. Mr. Kline did seek, however, the child identities to protect these victims of sex crimes.

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[17] It is difficult to fathom any other context where criminal targets could so effectively use the courts to prevent a prosecutor from using lawful means to gather evidence of their crimes. However, in the context of abortion it should surprise no one. It is "painfully clear that no legal rule or doctrine is safe from ad hoc nullification in this Court when an occasion for its application arises in a case involving state regulation of abortion. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814B (1986) (O'Connor, J., dissenting). Or as Justice Scalia later observed, "the jurisprudence of this Court has a way of changing when abortion is involved." *Hill v. Colorado*, 530 U.S. 703, 742 (2000) (Scalia, J., dissenting). One need not be an astute court watcher to know that this "abortion distortion" has manifested itself throughout the courts of this nation (state and federal) for the past forty years. One will certainly search in vain for another Kansas case where a prosecutor has been obstructed and persecuted in other contexts like Mr. Kline has been obstructed and persecuted for attempting to investigate Kansas abortion providers.

[18] *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 128 P.3d 364 (2006). The misleading nature of Justice Beier's *Alpha* opinion in is discussed in more detail in a later section.

[19] DeFries Report, at 16. Ex. 142.

This Court severely hampered the investigation by allowing the targets of the investigation to redact information rather than allowing Judge Anderson to determine the information to be redacted. Mr. Kline argued that it was unprecedented to allow the investigation target to determine what evidence to produce in a case where a judge subpoenaed records and found probable cause to believe that crimes were committed.

The Court's approach also created delay and resulted in over-redacting. Mr. Kline's office did not receive the redacted records until October 24, 2006. Losing a re-election bid shortly thereafter, Mr. Kline left office on January 8, 2007.

Mr. Kline's successor, Paul Morrison, had run an inflammatory campaign, heavily funded through donations from abortion providers, accusing Mr. Kline of using his office and anti-abortion ideology to invade the private lives and medical records of Kansas women.[20] Kansas media reported that Morrison promised to end Kline's investigation if elected. Mr. Morrison's likelihood of continuing Mr. Kline's investigation was nil, and everyone knew it.

V. The Appointment of Phill Kline as Johnson County District Attorney

To take office as Attorney General, Mr. Morrison had to vacate the office of Johnson County District Attorney, the same jurisdiction where Planned Parenthood performs its abortions. Mr. Kline was appointed by the Johnson County Republican

[20] The malicious dishonesty of the Morrison campaign was evident to all but the willfully blind. A month before the election, Morrison rolled out a television ad claiming Kline "wants our personal medical information in the government's hands. And, November 7th, it's in our hands to stop him." Mr. Kline responded with the Truth: "I am enforcing the law, and he is admitting he will not enforce the law." Chris Moon, *A.G. Says Judge Ok'd Abortion Inquiry,* TOPEKA CAPITAL-JOURNAL (Oct. 5, 2006).

precinct committee persons as Morrison's successor.[21] As District Attorney, Mr. Kline would have jurisdiction to prosecute Planned Parenthood, but the files and records already obtained as evidence were held in the Attorney General's office.[22] Seeking to keep Judge Anderson informed, Kline stated that he intended to share the files with law enforcement in Johnson, Sedgwick and Shawnee counties. Judge Anderson did not need to give Kline approval for the use of the records. In his view, prosecutors could exchange information with other law enforcement officials, and Mr. Kline was entitled to continue the investigation from a new public office. While Justice Beier later accused Mr. Kline of playing "both sides of the net" she could not conclude that the "unorthodox" move was unlawful.[23]

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[21] Mr. Morrison, elected District Attorney as a Republican, switched parties at the urging of Governor Kathleen Sebelius to run against Mr. Kline. Sebelius' plan "involved removing Phill Kline as attorney general and replacing him with a Democrat who would become the next governor of Kansas." STEPHEN SINGULAR, THE WICHITA DIVIDE 117-18 (2011).

[22] While campaigning, Morrison claimed that Kline, as Attorney General, did not have original jurisdiction to prosecute violations of Kansas abortion laws and that only District Attorneys have such jurisdiction. Thus, Morrison dismissed Kline's appeal of the dismissal of the original charges filed against Dr. Tiller in December of 2006 because Sedgwick County District Attorney Nola Foulston publicly opposed the filing. Yet, contrariwise, in *CHPP v. Kline*, Morrison contended evidence gathered to prosecute the abortion clinics must be lodged exclusively in the office of Attorney General. He sought to disgorge the evidence from Phill Kline, the District Attorney in CHPP's jurisdiction, and the only office, according to his theory, that could initiate the prosecution. This contradictory legal position makes sense only if Morrison's purpose was to shield the targets of the investigation.

[23] *CHPP v. Kline*, 287 Kan. 372, 414, 197 P.3d 370 (2008) ("Kline's long lob, enabling himself and his subordinates to play both sides of the net, was, at a minimum, unorthodox."). This is an unusual view of law enforcement in Kansas. Who would have thought that the Attorney General and a District Attorney would be on opposite sides of the net? Are they not both charged with enforcing Kansas law? They should be doubles partners. Justice Beier's colorful comment reveals her third-wave feminist perspective: A prosecutor who is willing to investigate crimes of abortionists is an opponent of the prosecutor who is not. *CHPP v. Kline* made it clear to the world which side of the net Justice Beier stands.

Mr. Kline had a sticky logistical problem: what should have been a simple transfer of records was complicated greatly by Morrison's intense and utterly unprofessional hostility toward Kline. Had Mr. Kline moved the records to Johnson County before Morrison vacated that office, he would have never seen them again. Affidavit of Phillip D. Kline, ¶¶ 6, 8. Both men were sworn in to their new offices on Monday, January 8, 2007.

Morrison's hostility included a pervasive lack of cooperation with Mr. Kline's transition team. Senior Assistant Attorney General Steve Maxwell visited the Johnson County District Attorney's office to introduce himself. He relates:

> Mr. Morrison . . . began cursing at me as loud as you can yell. I don't want to get vulgar, but he was using vulgarities towards me, screaming at me, ordered me out of the office. And this is in front of, you know, 15 or 20 staff members. He . . . ordered me to leave, continued to cuss at me, ordered me never to come back. Told me I wasn't welcome in the district attorney's office. Basically ordered me out of the building.

Maxwell 1502:6-17.[24] Mr. Morrison's paramour, Director of Administration Linda Carter, told him to apologize. Taking Mr. Maxwell into a private office, Morrison explained that he "hated Phill Kline and that he couldn't stand the fact that Phill Kline was going to become the District Attorney and that he despised him." *Id*. at 1503:3-23. Ms. Carter confirms that Morrison "was always upset and angry when they were there and always expressed disgust at the presence of the transition team. . . . there was a lot of profane language . . . . he had an extreme hatred for Phill Kline." Carter 1826:9-11 & 15-

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[24] Citations to the Final Hearing Report transcript are in the following form: [witness name] [page: line].

16, 1829:6-7. By contrast, Ms. Carter, who continued as Director of Administration under Mr. Kline, recalled: "[I]n the time that I worked for Phill Kline I never heard him utter one bad word about Morrison. And as a matter of fact, he was always very professional in . . . any discussions about Morrison." Carter 1829:14-18.

Because the political offices would be in transition on January 8, with movers, the public and unknown others being present in both offices, Mr. Kline's staff made the prudent decision to leave the investigative files and redacted patient records a half-mile away at the Shawnee County courthouse in the custody of Judge Anderson.[25]

VI. Records in Transition

On Friday, January 5, 2007, Mr. Kline's chief investigator, Tom Williams, removed all of the physical abortion investigation files, including the redacted patient records, from the Attorney General's office and loaded them into his state vehicle.[26] The next day, Williams and Maxwell organized files and records for a Monday delivery to Judge Anderson (five boxes) and to the Shawnee County District Attorney (three boxes).[27] On Saturday night they deposited three other boxes of records in the Attorney

[25] That Mr. Morrison was never investigated or sanctioned by this Court's Disciplinary Office for a whole host of questionable and bad behavior speaks volumes about political and judicial favor in this state.

[26] "I took investigative files, all the records pertaining to this case, put them in the state automobile . . . . nonelectronic files . . . the paper copies." Tom Williams 905:25-906:3. *See also* Tr. of Proceeding at 607:25-608:2, *CHPP v. Kline*, No. 98747 (Nov. 20, 2007) ("I had taken everything out of the office, had it in the car[.]").

[27] *See* Exhibit 90, Report of the Appointed District Judge [King Report] ¶¶ 91-97 (Jan. 10, 2008). "[W]e were verifying each record and where everything was going." Tr. of Proceeding at 609:24-25, *CHPP v. Kline*, No. 98747 (Nov. 20, 2007) (Tom Williams).

General's office that Morrison was about to assume. This Court described how Williams secured the records over the weekend.

> The patient records and other materials were then locked in the trunk of a state-owned vehicle Williams was driving. Williams returned a set of materials to the Attorney General's office, not including any CHPP or WHCS patient records, and left the rest of the materials sorted earlier at Maxwell's house in the vehicle. The vehicle spent the rest of that weekend parked in a secure state parking lot.[28]

Mr. Maxwell prepared a court-requested Status and Disposition Report, detailing the location of the inquisition records. The Report noted that copies of the medical files and the Kansas Department of Health and Environment ("KDHE") abortion reports (both paper and electronic) would be left with Judge Anderson for safekeeping.[29] A large cache of records, including Mr. Williams' investigative file, the sixty-two redacted Tiller files and corresponding KDHE reports, and related affidavits and transcripts were slated for delivery to Shawnee County District Attorney Robert Hecht.[30]

On Monday morning, January 8, Mr. Williams and another investigator, Jared Reed, distributed the records as planned.[31] Judge Anderson describes the delivery of the five boxes of records to his office:

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[28] *CHPP v. Kline,* 287 Kan. at 382-83. *See also* King Report ¶ 98.

[29] Exhibit 78, at ¶ 1.

[30] *Id.*, at ¶ 3.

[31] *CHPP v. Kline,* 287 Kan. at 383. *See also* King Report ¶¶ 103-04 (detailing delivery of records to Judge Anderson and District Attorney Hecht). Mr. Maxwell returned the SRS [Social and Rehabilitation Services] records as "no longer necessary." Exhibit 78, ¶ 6. *See also* King Report ¶ 109 (Williams and Reed "returned all previously obtained SRS records to SRS, completing the distribution of records.").

> I was getting ready to go to our swearing in, that would have been about 15 minutes until nine. Tom Williams and Jared Reed come in, each of them lugging a big banker's box and I say, "What is that?" And they say, "Well, these are the records we're supposed to deliver." I said, "Well, I didn't ask for the records, where is your report?" And I think they forgot it down in the car is what they said. I said, "Well, I've got to go to our swearing in." When I come back then five boxes of records are there and the status and disposition report is laying in my chair at my desk because they came and delivered it while I was out.[32]

The Supreme Court's special master, appointed for *CHPP v. Kline*, found that the five boxes of records left with Judge Anderson "included copies of the CHPP and WHCS redacted patient records, KDHE Termination of Pregnancy Reports and the Status and Disposition Report."[33]

The following day, Tuesday, January 9, Judge Anderson wrote to Mr. Morrison and offered him the opportunity "to pick up the inquisition evidence that had been left at the judge's chambers by Williams and Reed the day before."[34] Veronica Dersch and Richard Guinn of Morrison's office visited Judge Anderson Wednesday morning, January 10. Ms. Dersch recalls: "We met with him and he said there are some things here in my closet, locked closet that you need to take with you, some materials that were left with me on Friday . . . and this status and disposition report tells you where

[32] Anderson 749:9-23. Judge Anderson initialed receiving the Report at 9:20 AM. Maxwell 1495:1-19.

[33] King Report ¶ 103.

[34] *CHPP v. Kline*, 287 Kan. at 384; *See also* Letter of Hon. Richard D. Anderson to Att'y Gen. Paul J. Morrison, at 2 (Jan. 9, 2007) ("You may retrieve the evidence returned to the Court which has been identified in the Status and Disposition Report."), Exhibit 7, Redacted Materials released in *CHPP v. Kline* (May 2, 2008).

everything else is."[35] At their instruction, Bob Blecha of the Kansas Bureau of Investigation retrieved the five boxes of subpoenaed records.[36] Judge Anderson memorialized the retrieval by Morrison's people in a court opinion:

> On the morning of the day Mr. Kline left office, his agents delivered five large file boxes of records to the Court with the Status and Disposition Report. On January 9, 2007, the Court notified newly elected Attorney General Paul J. Morrison that the materials had been delivered and could be retrieved. Mr. Morrison's agents promptly retrieved the materials.[37]

He testified similarly in a Supreme Court evidentiary hearing:

> When Kline left office on the day that everyone was sworn in, including judges in our district court, five boxes of records were delivered to me, long banker's box records were delivered by the Attorney General's office to me. **I had Morrison's officers come over a couple of days later, they retrieved those records**.[38]

Attorney General Morrison's office also retrieved the files that were left at the courthouse with Shawnee County District Attorney, Robert Hecht. "[T]here was a whole bunch at Bob Hecht's office." recalled Veronica Dersch. "The entire investigative file

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[35] Dersch 67:20-68:2.

[36] "On January 10, 2007, Morrison's agents picked up the boxes of records which had been delivered to the court by Kline." Additional Response to Petition for Mandamus at 3, *Morrison v. Anderson*, No. 99,050 (Oct. 19, 2007), Exhibit Z5. *See also* Anderson 753:8-20 (KBI agent Bob Blecha "was the person I believe that actually physically carted the records out" that day or the next morning.); Dersch 68:6-13 (Feb. 21, 2011) (explaining the choice of a KBI agent to retrieve the boxes "because we felt like we needed a chain of custody").

[37] Mem. Decision at 3 (Apr. 18, 2007), Exhibit B6. *See also id*. at 5 ("Five file boxes were delivered to the Court and retrieved by Attorney General Morrison's officers.").

[38] Tr. of Proceeding at 84, *CHPP v. Kline*, No. 98747 (Nov. 19, 2007), Exhibit B7 (emphasis added).

was there. . . . We sent Mr. Blecha to get them[.]"[39] The Supreme Court's Special Master wrote in his report: "On January 18, 2007 all files left behind with District Attorney Hecht's office were turned over to KBI Deputy Director Robert E. Blecka [sic]."[40]

Three months later Judge Anderson stated to Dersch: "There is evidence of crimes in those [CHPP] records that need to be evaluated." She replied: "Right. And we have been evaluating that since you gave us a third copy of those records a week ago."[41] As Mr. Kline explained: "He had access to the case file in paper documents and five boxes with Judge Anderson. He had access to the medical records that were maintained by Judge Anderson. He had access to the entire electronic file[.]"[42] Ms. Dersch confirms that Bob Blecha was sent out to retrieve the records "right away" after identifying the locations from the Status and Disposition Report. "The first thing he went to was Judge Anderson and Robert Hecht's office."[43]

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[39] Dersch 68:17-22. "I had what I called an investigative file, which was in some black folders, and there were multiple volumes." Tr. of Proceeding at 606, CHPP v. Kline, No. 98747 (Nov. 20, 2007) (Tom Williams). *See also* King Report ¶ 104 ("Williams' investigative records consisted of multiple black folders that contained investigative reports, memos, and subpoenas from the inquisition.").

[40] King Report 66. *See also* Investigation Report of Special Agent R.E. Blecha (Jan. 18, 2007) (stating that he picked up "62 files" [redacted Tiller records] from District Attorney Hecht and two other boxes of inquisition "medical files," and turned them over to Veronica Dersch "for safekeeping"), Exhibit A5, at DA 4265.

[41] Tr. of Hr'g at 10:25-11:4, Shawnee County 3rd Dist. Ct., No. 04-IQ-03 (Apr. 10, 2007).

[42] Kline 2080:25-2081:4.

[43] Dersch 140:23-141.

The factual record on the transfer of medical and investigative records when Mr. Kline was vacating the Attorney General's Office is summarized and emphasized here so that the appalling misrepresentations in Justice Beier's *CHPP v. Kline* opinion may be understood for what they are and that the "no records left behind" ruse is unambiguously clear: *Within two days of taking office*, Mr. Morrison had in his possession, or direct access to, the *entire* case file and the subpoenaed CHPP, WHCS, and KDHE records. All told, Mr. Kline left for Mr. Morrison about 3000 pages of records[44] in addition to electronic document files residing on the Attorney General's computer network.[45] The original redacted abortion clinic records in the custody of the court were also available to him for copying.[46] In other words, two of the central themes of *CHPP v. Kline* (that Mr. Kline left no records behind and that Mr. Kline's handling of the records impeded Attorney General Morrison's ability to investigate) are completely contradicted by the record.

VII. Planned Parenthood and Attorney General Morrison Join Hands to Dislodge from District Attorney Kline and from Judge Anderson the Evidence of Planned Parenthood's Crimes.

Not content to have a complete set of the inquisition records in his possession, including the original investigative file, the redacted abortion clinic records, and many

[44] Dersch 80:14-20.

[45] "Anything that was in the file was pretty much in the electronic file." Williams 908:10-11.

[46] On March 27, 2007, Mr. Morrison copied the original redacted CHPP records in the custody of Judge Anderson. Pet. for Writ of Mandamus at 4, *Morrison v. Anderson*, No, 99,050 (Aug. 2, 2007), Exhibit U5. *See also* Response to Pet. for Writ of Mandamus at 4, *Morrison v. Anderson*, No, 99,050 (Nov. 7, 2007) ("Morrison made a copy of those redacted records, and promptly returned the original set of redacted CHPP records to the court."), Exhibit V6.

thousands of KDHE abortion reports,[47] Morrison filed a motion with Judge Anderson on April 13, 2007 seeking to compel Phill Kline to relinquish all copies of the redacted client records in Kline's possession.[48] Judge Anderson denied the motion because the records were redacted, Kline had legitimate prosecutorial reasons to retain them, and Morrison "has copies of the same records."[49] Furthermore, "[t]he public interest would not be reasonably advanced and could even be impaired by ordering the return of medical records."[50] Forcing the District Attorney to start a new investigation in Johnson County to subpoena records he already had "would cause delay, burden the investigation, and would impose unnecessary expense on everyone with a second subpoena for the same records."[51]

Although Judge Anderson rebuked Morrison's effort to strip the hard-won evidence from Kline's office, Morrison's efforts to run interference for Planned Parenthood had only begun and ran parallel to Planned Parenthood's own aggressive, anti-Kline litigation. On June 6, 2007, Planned Parenthood filed a petition for mandamus with this Court seeking to compel Kline to return the subpoenaed records he was

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[47] "[W]e had two or three huge banker boxes which had the KDHE records, the termination of pregnancy records. . . . if they normally . . . perform 10 or 12,000 abortions a year we had that many pieces of paper for each year." Williams 911:4-12.

[48] Exhibit B6, at 1. Morrison's motion establishes beyond doubt that he was concerned *not* with using all of the records *already* at his disposal to investigate abortion-related crimes, but rather with terminating District Attorney Kline's ability to do so.

[49] *Id.*

[50] *Id.* at 5.

[51] *Id.*

holding.[52] On June 25, 2007, Morrison issued a letter clearing Planned Parenthood of all charges.[53] On July 9, Morrison turned his fire against Judge Anderson, filing a motion seeking to have Judge Anderson surrender *his* file of the original redacted records.[54] On July 12, Planned Parenthood counsel arrived unannounced at Judge Anderson's office and boldly demanded that the records be handed over.[55] Explaining that the records held potential evidence of felony falsification by Planned Parenthood, Judge Anderson refused to relinquish them.[56] On August 2, 2007, Morrison filed a petition for writ of mandamus against Anderson in this Court seeking to compel the return of the records.[57] On September 4, this Court permitted Morrison to intervene on the side of Planned Parenthood in its mandamus action against Phill Kline.[58] Thus, this Court was the forum used by both Morrison and Planned Parenthood to attack both judge and prosecutor for possessing evidence of Planned Parenthood's criminal activity.

On October 24, 2007, exactly one week after Mr. Kline filed 107 criminal counts against CHPP in Johnson County, the Supreme Court announced that it did not have

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[52] *CHPP v. Kline*, 287 Kan. 382, 386, 197 P.3d 370 (2008).

[53] Letter from Paul Morrison to Pedro Irigonegaray (June 26, 2007), Exhibit R6.

[54] Additional Response to Petition for Mandamus at 7, *Morrison v. Anderson*, No. 99,050 (Oct. 19, 2007), Exhibit Z5.

[55] *State v. CHPP*, 291 Kan. 322, 334, 339-40, 241 P.3d 45 (2010).

[56] Letter from Hon. Richard J. Anderson to Paul Morrison and Phill Kline (July 13, 2007).

[57] *Morrison v. Anderson*, No. 99,050, Exhibit U5.

[58] *CHPP v. Kline*, 287 Kan. at 388.

sufficient information to decide whether Kline's post-*Alpha* handling of the abortion records justified an order forcing him to return them all to CHPP. The Court ordered District Judge David King to hold a special evidentiary hearing and to issue a report with his findings.[59] The Court sealed the record, required Mr. Kline and his staff to provide substantial discovery, and subjected them to cross examination by Planned Parenthood's attorneys. Kline, of course, was given no reciprocal opportunity.

VIII. The Supreme Court Decides *CHPP v. Kline*.

Over a year later, on December 5, 2008, this Court ruled on the Planned Parenthood/Morrison joint attack on District Attorney Kline's possession of copies of the redacted clinic records.[60] In an opinion written by Justice Beier, the Court found that Kline *lawfully* possessed the records, that an Attorney General *has* the authority to share investigative material with other law enforcement officers, and that *Alpha* did *not* control what happened to the records after completion of the redaction protocol.[61] The Beier opinion concluded:

> CHPP and the Attorney General are not entitled to the primary relief they seek. We will not force Kline to disgorge "each and every copy" of the patient records Kline and his subordinates have made "and any and all other evidence Kline developed and obtained while he was acting as Attorney General that he took with him to Johnson County."[62]

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[59] *Id. See* KAN. CT. R. 9.01(d). *See also State v. CHPP*, 291 Kan. 322, 337, 241 P.3d 45 (2010).

[60] *CHPP v. Kline*, 287 Kan. 372, 197 P.3d 370 (2008).

[61] *Id.* at 414-16.

[62] *Id*. at 416.

The records essential to the Johnson County prosecution of Planned Parenthood would remain with Mr. Kline's office, a *clear* victory for Mr. Kline.[63]

A. Spinning Legal Victory into a Public Relations Defeat

Contrary to the Court's actual holding, the Beier opinion miscast the fact record again and again to obscure Mr. Kline's victory and to paint him as a wrongdoer. Tell-tale signs appeared early in Justice Beier's opinion with cynical speculation that had *no basis* in the record. For example, she implied that Mr. Kline's filing of 107 counts against CHPP on October 17, 2007, arose not from the merits of the case, but to distract attention from an affidavit detailing the movement of the redacted records from the Attorney General's office to Johnson County. "At that point," she wrote, "Kline had an incentive to dissipate any light and heat directed at his conduct by this mandamus action."[64] With no evidence to support her accusation except her own imaginative correlation,[65] Justice Beier accused Mr. Kline of filing a serious criminal action to rebut an affidavit filed under seal in a related civil action. She did not mention that the district judge, presumably having no light and heat to dissipate, had found probable cause for the filing of charges.

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[63] In January, 2009, Mr. Kline left office. The CHPP prosecution continued under his successor, Steve Howe. *See State v. CHPP*, 291 Kan. 322, 351, 241 P.3d 45 (2010). On January 29, 2009, having ruled that Mr. Kline lawfully possessed the records, this Court dismissed the Attorney General's parallel mandamus seeking their return from Judge Anderson. *Id.*

[64] *CHPP v. Kline*, 287 Kan. at 409.

[65] That correlation proves causation is a logical fallacy known as *cum hoc ergo propter hoc*.

Contrary to Judge Anderson's repeated statements recognizing the substantiality of the evidence and without mentioning Judge Vano's probable cause finding in support of the charges, Justice Beier cast an unseemly light on Mr. Kline *for doing what prosecutors do*—filing charges supported by probable cause against alleged malefactors. Gratuitous insult to Mr. Kline's integrity as a prosecutor, however, was mere prelude. Conceding that his "long lob" of the clinic records from the state capital to Johnson county "was not illegal," Justice Beier nonetheless speculated that "it was cynically calculated not only to facilitate Kline's ability to continue his pursuit of CHPP and WHCS despite his rejection by the statewide electorate but also to defeat or delay any review of the legal justification of that pursuit by a political nemesis whom the same electorate had selected as Kline's successor."[66]

This double-barreled discharge of judicial abuse invites several observations, all of which go to Beier's injudicious behavior. First, the possibility that Mr. Kline's conduct was motivated by his desire to deter cover-ups of child rape in Kansas apparently never occurred to Justice Beier or others on her side of the net. Second, rejected or not by the statewide electorate, Mr. Kline was legally chosen to serve as District Attorney by citizens in Johnson County. Kansas Supreme Court justices, by contrast, are political appointees selected by the Governor without any popular vote, statewide or otherwise.[67] Uncontested retention elections for justices are ordinarily a formality, and hardly

[66] *CHPP v. Kline*, 287 Kan. at 414.

[67] KAN. CONST. art. III, § 5 (A bar-controlled nominating commission selects three nominees for open positions).

compare to the challenge of adversarial politics.[68] It is unclear what qualifies any Supreme Court justice for such political commentary or why such opinions are relevant to law or ethics, *except* to expose the bias of the author.

Third, it is unclear how losing one election delegitimizes the appointment of a prosecutor to a different prosecutorial office, disqualifies him (or any office holder) from continued loyalty to the very ideals that attracted him to public life, or otherwise has anything to do with law or ethics. "Popularity," said Justice Beier during a speech at a law school awards banquet, "tells us nothing about the worth of one's ideas or the merit of putting them into practice."[69] And yet, when it came to Phill Kline, the loss of a popular vote tells everything about "the worth of one's ideas" and makes his continued prosecution of crimes "cynical." Justice Beier's political commentary on Mr. Kline's conduct drips with hypocrisy and further highlights her loss of neutrality on this matter.

Fourth, the blithe characterization of Mr. Kline's investigation as "pursuit of CHPP and WHCS" trivializes the gravity of what was being "pursued." Mr. Kline's attempt to enforce Kansas law was something more than a Keystone Cops road race; it was a "pursuit" to (1) protect minors from sexual abuse and the resulting abortion cover-

[68] *See id.*, art. III, § 5(c).

[69] Carol A. Beier, *Risk and Responsibility: The Contours of Civic Courage*, 43 WASHBURN L.J. 369, 371 (2004).

up,[70] and (2) end the mockery of Kansas abortion law that had made Wichita the "late-term abortion capital of the world."[71]

Fifth, that Justice Beier was more fixated on politics than on objective application of the law is reinforced by her baseless conjecture about what Mr. Kline believed his "political nemesis" might do upon taking office. With Morrison's campaign having assured the world that he would discontinue Kline's efforts to enforce Kansas abortion and reporting laws, there would be no "review" for Kline to "defeat or delay." Furthermore, as discussed in greater detail below, Morrison had available to him all the records necessary for that review two days after he took office.

B. The Big Lie.

Building on these nascent themes, Justice Beier then unleashed a whopper.

> The record before us demonstrates that Kline and his subordinates did not merely take copies of patient records and some or all of the work product they generated in the inquisition while Kline held the position of Attorney General. They took *all* copies of the patient records and certain other materials as well.[72]

Yes, they took the records to Mr. Maxwell's house to organize for delivery to Judge Anderson and to District Attorney Hecht at the Shawnee County Courthouse. Could Justice Beier have actually meant what is *patently false*, that Kline's people took

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[70] See the videos of his courageous "pursuit" of the abusive directors of a home for the mentally ill in Newton, Kansas. http://www.youtube.com/watch?v=kLhPeeWn1rQ; http://www.youtube.com/watch?v=mD1pa8Y9R6I.

[71] *See, e.g.*, Samir Arif, *Governor Signs Historic Bi-Partisan Pro-Life Legislation*, STATE NEWS SVC. (Apr. 11, 2011) ("For far too long, Kansas has regrettably been known as the late term abortion capital of America.") (statement of Rep. John J. Rubin).

[72] *CHPP v. Kline*, 287 Kan. at 416.

everything to Johnson County and left nothing at all behind for Morrison? There is no other honest way to interpret Beier's use of plain English. "[N]o coherent copies of these records," she continues, "or of other investigation materials were left behind. Indeed, we cannot condone his effort to stand in the way of his successor doing his job."[73] This *spectacular falsehood* far exceeds in egregiousness the denigrating cynicism in her earlier commentary. After lamenting that Kansas taxpayers had paid to gather or generate materials that then disappeared, Justice Beier solemnly stated:

> We therefore hereby order the following relief:
>
> Kline shall produce and hand deliver to the Attorney General's office no later than 5 p.m. on December 12, 2008, a full, complete, and understandable set of the patient records and any and all other materials gathered or generated by Kline and/or his subordinates in their abortion-related inquisition while Kline was Attorney General.[74]

Justice Beier's problem is that this so-called "relief" was completely unwarranted, is not what Planned Parenthood and Morrison sought in the mandamus action, and—as we shall see—contradicted the factual realities recited in her opinion just pages earlier. Planned Parenthood and Morrison sought an order denying Mr. Kline the right to retain copies of the records in Johnson County. Justice Beier crafted a remedy suggesting that Mr. Kline had somehow wrongfully withheld records from Attorney General Morrison. This fabricated remedy for a non-existent problem served only to further vilify Kline in

[73] *Id.*

[74] *Id.* at 416-17.

the eyes of the public, and is consistent with Justice Beier's stated strategy of using the media to advance the third-wave agenda.

The evidence before Justice Beier that (1) Kline did *not* take with him all copies of the records, and that (2) Morrison *had* access to all investigation records within days of taking office, is too overwhelming to be debated in good faith, and indeed was acknowledged throughout Justice Beier's opinion. The opinion referenced the Status and Disposition Report ten times in the background section.[75] Four of the references were in quotations from Judge King's report to the Court.[76] The King Report thrice identified the Status and Disposition Report as "Intervenor's Exhibit #6."[77] Thus, Justice Beier not only repeatedly cited Maxwell's Report, but it was readily available to her in the record. Furthermore, she wrote in the background section of the opinion that Williams and Reed "left five boxes of materials at Judge Anderson's chambers" and "several boxes of materials, including patient records" with District Attorney Hecht.[78]

The contents of these boxes were spelled out in the Status and Disposition Report. Returned to the Court for safekeeping were

> a) copies of medical files #s: [redacted]
>
> b) Copies of 2003, 2004, and Jan. 2005 KDHE reports for induced termination of pregnancy

[75] Id. at 382-85, 399-400.

[76] *Id*. at 400.

[77] King Report 17, ¶ 71; 22, ¶ 97; 24, ¶ 104.

[78] *CHPP v. Kline*, 287 Kan. at 383.

c) two floppy disks containing KDHE electronic files.[79]

Submitted to Mr. Hecht "for his review and contemplation of criminal charges" were copies of the Tiller medical files, the corresponding KDHE forms, the "official investigative case file," related affidavits, and a transcript of witness testimony.[80] Additionally, Judge King, tracking the recitation in the Status and Disposition Report, detailed in his report the contents of the records left in each location.[81] He specifically noted that the boxes left with Judge Anderson "included copies of the CHPP and WHCS redacted patient records," and that "copies of the official investigative case file" were left with Mr. Hecht.[82] According to the Status and Disposition Report, the only documents listed as going to Johnson County were a set of CHPP records.[83] Additionally, as testimony brought out, a set of WHCS records, copied from those left with Mr. Hecht the morning of the records distribution, also went to Johnson County,[84] as well as Mr. Maxwell's pleading files.[85]

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[79] Status and Disposition Report, ¶ 1.

[80] *Id.*, ¶ 3.

[81] King Report ¶¶ 103-04.

[82] *Id.*

[83] Status and Disposition Report, ¶ 7.

[84] King Report ¶¶ 105-08; *CHPP v. Kline*, 287 Kan. at 383-84.

[85] King Report ¶¶ 89, 94 ("one or two boxes that contained Stephen Maxwell's files . . . correspondence, briefs, pleadings, etc.").

The record before the Court disclosed the location of all the files as of noon on January 8, 2007. Justice Beier's statement ("They took *all* copies of the patient records and certain other materials as well.") is completely false. Her further statement that "no coherent copies of these records or of other investigation materials were left behind" is equally false. The core documents, namely the patient records, KDHE reports, and the investigative files, were all left at the Shawnee County courthouse in the custody of responsible law enforcement and judicial officers.

Furthermore, completely contrary to Justice Beier's charge that Kline somehow deprived Morrison of access to the records, the background section of Beier's opinion confirms how Morrison learned of the location of the records. "On January 9, 2007, Judge Anderson sent a letter to Morrison . . . and offered to permit Morrison to pick up the inquisition evidence that had been left at the judge's chambers by Williams and Reed the day before."[86] Morrison also learned of the records left with Mr. Hecht, most likely from the Status and Disposition Report.[87] He picked them up on January 18.[88] With everything waiting for Attorney General Morrison in the nearby County courthouse the

[86] *CHPP v. Kline*, 287 Kan. at 384.

[87] Four days after the swearing in, Phill Kline wrote to Mr. Morrison's Chief Counsel directing him to examine the report filed with the Court detailing "the location of all of the case file documents." Letter from Phill Kline to Rick Guinn (Jan. 12, 2007), Exhibit J5 (same as Exhibit 9 in *CHPP v. Kline* evidentiary hearing).

[88] King Report ¶ 66.

day after he took office, it is clear that Kline did not in any way "stand in the way of his successor doing his job."[89]

C. The Deeper Ramifications of the "No Records Left Behind" Deception: Helping Morrison To Help Planned Parenthood On Another Front.

Not only did Morrison have prompt access to all of the records upon taking office as Attorney General, but it was known to Justice Beier and everyone else well before the *CHPP v. Kline* opinion that Morrison had *already* acted on them (*i.e.*, refused to prosecute). The facts laid out at the beginning of the *CHPP* opinion, as well as the report of the Court's own fact finder, establish the pointlessness of the so-called "Other Appropriate Relief"[90] annexed to the Court's opinion. Morrison had completed "his job" by exonerating Planned Parenthood on June 25, 2007, a year and a half *before* the *CHPP v. Kline* opinion. The background section of the opinion establishes that Justice Beier understood this: "On September 4, 2007, this court permitted Morrison to intervene in this action. By this time, Morrison had closed the inquisition launched by Kline in Shawnee County [and] had sent CHPP a letter saying that no charges would be filed . . . ."[91] As Morrison stated to Planned Parenthood in a letter which this Court released to the public as part of the filings in the parallel case of *Morrison v. Anderson*: "Since taking office on Monday, January 8, the attorneys and investigators of my administration have conducted an objective, unbiased, and *thorough examination of the numerous documents*

[89] *CHPP v. Kline*, 287 Kan. at 416.

[90] *Id.*

[91] *Id.* at 388

and medical records that Mr. Kline subpoenaed."[92] Morrison confirmed in his brief after the Court granted his petition to intervene that he "completed review of the Comprehensive Health records and found no evidence of wrongdoing."[93]

Such examination would be impossible without possession of the records. All of which begs the question: What further need would Morrison, or his successor Steve Six, have for yet another set of those records, and how could getting them qualify as relief in any form, let alone "appropriate relief," in an extraordinary mandamus action? As Mr. Kline later stated: "I was baffled . . . that the Court would order me to give the evidence that I have in a criminal case to the party who had publicly cleared the criminal defendant . . . ."[94] Mr. Kline is less baffled in hindsight, understanding the deeper ramifications of the Beier opinion.

The background section of the *Kline v. CHPP* opinion states: "Morrison did not seek any relief beyond that sought by CHPP, asking only that the CHPP patient records be returned to the Attorney General's office."[95] However, Morrison in his *CHPP v. Kline* brief did not seek the return of Planned Parenthood records or related investigative material for the purpose of "doing his job" or "for lack of coherent copies of these records." He had already done his job with a full set of "coherent records" before ever

[92] Letter from Paul J. Morrison to Pedro Irigonegaray (June 25, 2007), Exhibit R6 (emphasis added).

[93] Exhibit 88, at 1971.

[94] Kline 2159:6-14.

[95] *CHPP v. Kline*, 287 Kan. at 388.

seeking to intervene in the case. His only purpose for intervening in CHPP or filing *Morrison v. Anderson* was to remove evidence of criminal wrongdoing by Planned Parenthood from the District Court judge and from District Attorney Kline. Morrison wanted Judge Anderson and Mr. Kline to give up *their* sets of the redacted records solely to stymie the prosecution of Planned Parenthood, not to further any prosecutorial purpose of his own. Morrison's intentions are revealed in his June 25, 2007 exoneration letter to Planned Parenthood's counsel: "[W]e will soon be asking the Court to return all of the original unredacted medical records the former Attorney General subpoenaed. We also will return to you *the redacted medical records currently in our possession*."[96] Apart from his false statement that the Court possessed "unredacted medical records," Morrison's purpose was clear—returning all the evidence acquired in the inquisition to Planned Parenthood. *See also* Affidavit of Phillip D. Kline, ¶¶ 10-13.

Morrison's purpose was restated in his brief filed in *CHPP v. Kline* on September 25, 2007. Referring to the records held by Judge Anderson and Kline, Morrison argued: "[T]his Court should order *both* sets of records be returned to the Office of Attorney General, *so they may be returned to Comprehensive Health*."[97] Mr. Morrison did not seek these records to overcome Phill Kline's "cynically calculated" effort to "defeat or delay" review of the evidence.[98] He sought their "immediate return," as he stated a second time

[96] Exhibit R6 (emphasis added).

[97] Exhibit 88, at 1974.

[98] *CHPP v. Kline*, 287 Kan. at 414.

in his brief, "so they may be returned to Comprehensive Health where they belong."[99] The "appropriate relief," as it turns out, was a *fabricated pretext*, having nothing to do with allowing the Kansas Attorney General to "do his job" or otherwise discharge his duties on behalf of Kansas citizens.

D. Justice Beier's Attack on Phill Kline

While Attorney General Morrison worked with Planned Parenthood to whitewash Planned Parenthood's crimes, Justice Beier went about the business of threatening Phill Kline and setting up this ethics case. Not content to have convinced (or misled) her colleagues into ordering "other appropriate relief" where none was needed and on false premises, Justice Beier used that "relief" as a platform from which to launch a chastising sanction against Mr. Kline. First she repeated the big lie: "The record before us discloses numerous instances in which Kline and/or his subordinates seriously interfered with the performance of his successors as Attorney General . . . ."[100] Then, invoking the Court's "inherent power to sanction . . . without particular statutory authorization,"[101] she ordered:

> Kline shall produce and hand deliver to the Attorney General's office no later than 5 p.m. on December 12, 2008, a full and complete and understandable set of any and all materials gathered or generated by Kline and/or his subordinates in their abortion-related investigation and/or

[99] Exhibit 88, at 1978.

[100] *CHPP v. Kline*, 287 Kan. at 420.

[101] *Id.* at 419.

> prosecution *since Kline was sworn in as Johnson County District Attorney*.[102]

The Court thus ordered Mr. Kline to turn over to the Attorney General (and thus to Planned Parenthood) investigation files *that were at no time in the Attorney General's office*. Because this "sanction" echoes the "other appropriate relief" in form and style, the average reader, or even a colleague on the Court, might have missed the execution of a clever plan. The sanction seems like a logical piggy-back on the "other appropriate relief." Without the prior deception, however, Justice Beier would have had a much harder sell to extract the Johnson County files from Mr. Kline, files that obviously had no relationship whatsoever to any relief *allegedly* sought by the parties. This malign brainstorm, lacking any statutory basis, but seemingly linked to the prior "no records left behind" fiction, delivered to Planned Parenthood everything in the Johnson County District Attorney's office that supported the pending 107-count prosecution of Planned Parenthood. The compelled return of records the Attorney General already had, though meaningless, functioned to set up a "sanction" truly damaging to the prosecutorial effort against Planned Parenthood. After falsely imputing fabricated motives and improper conduct to Kline, Justice Beier's opinion aided Morrison's mission of extricating Planned Parenthood from further prosecution.

Additionally, and at the height of hypocrisy when viewed against the years of false accusations by Morrison and others that Mr. Kline did not adequately protect patient privacy, the overreaching sweep of Justice Beier's second "sanction" required the transfer

[102] *Id.* at 423 (emphasis added).

of information to Morrison (and therefore to Planned Parenthood) that was *unrelated* to the Planned Parenthood prosecution, including, as Mr. Kline explained, "evidence that had been provided to us relating to Planned Parenthood clinics, *other than* the one that was the criminal defendant in Johnson County. *Personal, private statements, medical records, and documents of people who had our assurance that this would not be divulged.*"[103] Serving as a judicial soldier for Planned Parenthood, supposedly in the name of privacy, Justice Beier compelled Mr. Kline to breach the privacy of his informants. "I've been told," Mr. Kline said, "that all of that information was then turned over to the attorneys for the abortion clinics."[104]

The Beier Court's rationale for forcing District Attorney Kline to copy all of his Johnson County files for Morrison, and thus for Planned Parenthood, required the prior false finding that Kline had stripped files from the Attorney General's office. "[B]ecause Kline and his subordinates," wrote Justice Beier, "have, during their time in Johnson County, capitalized on what they learned while Kline was Attorney General, we hereby order the following sanction . . . ."[105] To get the Johnson County files to Planned Parenthood, Justice Beier had first to find that Mr. Kline had abused his successor in taking files from the Attorney General's office. That fictional malfeasance then fed the

[103] Kline 2166:4-9 (emphasis added).

[104] *Id.* at 2167:1-4.

[105] *CHPP v. Kline*, 287 Kan. at 423. The world still awaits an explanation for why a prosecutor should be sanctioned for capitalizing (during a legitimate criminal investigation) on information he learned while holding his previous office. The only people punished by the "sanction" were the citizens of Johnson County (and elsewhere in Kansas) who wanted Mr. Kline to investigate and prosecute abortion-related crimes according to the rule of law.

rationale for making him provide prosecution files and private personal information to an abortion-protecting Attorney General who would then forward them to Planned Parenthood.

Together, Morrison and Justice Beier effectively served as a snoop dog for Planned Parenthood, creating a judicially-sanctioned Watergate operation against the files of the Johnson County District Attorney. Whether her colleagues abdicated their responsibility to keep her honest by examining the record for themselves and carefully checking the logic of her writing, or whether Justice Beier simply manipulated their trust in her for her own purposes, *CHPP* will forever stand as a flagrant example of dishonest opinion writing.

E. The Senior Justices Rebuke the Rebuke.

Two justices who are no longer on the Court, while apparently not perceiving the foundational lie about "no records left behind," nonetheless were sufficiently disturbed by the Court's strange sanction to dissociate themselves from it.

Justice Robert E. Davis' concurrence apparently accepted the "no records left behind" ruse as true. "When Kline removed records from the Attorney General's office, *leaving no copy for the incoming Attorney General*, he made it difficult if not impossible for the incoming Attorney General to determine his course of action regarding the information within those records." *CHPP v. Kline*, 287 Kan. at 427 (Davis, J., concurring) (emphasis added). On that false assumption, Justice Davis concurred in the "other appropriate relief" of ordering Mr. Kline in mandamus to "restore to the present Attorney General what is rightfully his." *Id.* He disagreed, however, with terming that relief a

"sanction." Mr. Kline had violated no law. Because "the majority is not measuring counsel's action against any statute, rule, or other established standard," the Court had standardless discretion to sanction at will, a violation of due process. *Id.* at 428-29. No litigant could ever know beforehand whether he had offended or not. "The fundamental problem with the majority's decision to impose sanctions in this case is that there is no objective test—statutory or otherwise—by which the court can measure Kline's conduct and by which attorneys can avoid such penalties in the future." *Id.* at 428.

Chief Justice McFarland, in her thirty-first year on the Court, also fell for "no records left behind" and agreed with Justice Davis that "Kline's failure to leave a complete set of records and investigative materials for the incoming Attorney General hampered his successor's ability to determine his course of action with regard to the investigation." *Id.* at 429-30. She therefore agreed that Mr. Kline must supply a complete set of records "generated or gathered . . . while he was the Attorney General and during his tenure as the Johnson County District Attorney." *Id.* at 430. Although she described this production as "the relief requested, warranted, and available in this mandamus action," *id.*, she did not distinguish between the Attorney General files demanded in the mandamus action and the Johnson County records that neither party had requested. Justice Beier's invocation of "no records left behind" apparently succeeded in also persuading the Chief Justice to endorse both demands.

Although the Chief Justice echoed Justice Davis' explanation that Mr. Kline had a duty "to restore to the present Attorney General copies of the records to which he is rightfully entitled," and termed this "the very relief requested by the Attorney General,"

id., the Chief Justice was wrong (and presumably misled). The record reflects that neither Mr. Morrison nor Mr. Six had requested or was entitled to records "gathered or generated" solely in Johnson County. Indeed, at the outset of the case Mr. Morrison sought only the redacted abortion clinic records. "Before filing his most recent brief," wrote Justice Beier, "the Attorney General had not attempted to use this case as a vehicle to obtain return of items other than patient medical records." *CHPP v. Kline*, 287 Kan. at 404. Later on, after Morrison cleared Planned Parenthood and Mr. Kline had filed formal criminal charges, Mr. Six expanded the demand to seek "each and every copy of those records that [Kline] has made and any and all other evidence Kline developed and obtained while he was acting as Attorney General that he took with him to Johnson County." *Id.*

Apart from the obvious point that neither Morrison nor Six were missing any records, and that Mr. Six's expanded demand thus had no other purpose than to remove the necessary evidence to prosecute Planned Parenthood from Mr. Kline's possession, neither Six nor Morrison ever asked for any material generated solely in Johnson County. Justice Beier's over-the-top remedy, styled as a second "sanction," was swallowed whole by all of her colleagues with only a "due process" hiccup by Justices Davis and McFarland. Without the "sanction," Justice Beier could not have made the great leap into the exclusively Johnson County files. She understood its necessity, but Justices McFarland and Davis, apparently not perceiving the underlying deception, balked only at the sanctions methodology.

Not only did the Court sanction without authority, writes Justice McFarland, including failure to make a necessary "bad faith" finding, but also the sanction itself—copying files to send to the Attorney General—had little connection to the perceived lack of respect for the Court that prompted the penalty. "[T]he sanction imposed bears no relationship to the majority of the conduct the court cites as the basis for the sanction . . . ." *Id*. at 431-32. Justice McFarland is close to the insight that the litany of actions recited by the Court to justify its "sanction" is mere pretext to plunder the Johnson County files. But she did not get that far. She saw the disconnect not for its role as performing an intelligence raid for Planned Parenthood but only as a vehicle for attacking Mr. Kline.

> This disconnect between the sanction imposed and the conduct that serves as the majority's justification for sanction, coupled with the fact that the sanction the majority fashions could simply be ordered as relief in this mandamus action, reveals that the majority is more interested in reprimanding Kline for his attitude and behavior in the course of this litigation than in remediating the failure to leave a complete set of the investigation records for the incoming Attorney General.

Id. at 432-33. Justice McFarland returned the rebuke back on the Court.

> It appears to me that the majority invokes our extraordinary inherent power to sanction simply to provide a platform from which it can denigrate Kline for actions that it cannot find to have been in violation of any law and to heap scorn upon him for his attitude and behavior that does not rise to the level of contempt. This is the very antithesis of "restraint and discretion" and is not an appropriate exercise of our inherent power.

Id. at 433.

IX. The Public Reacts.

As if the deceptive opinion was not bad enough, the Court allowed its spokesman, Ron Keefover, to spin the deception out to the public in his opinion summary:

> Former Attorney General Paul Morrison . . . and his successor, Stephen N. Six joined the clinic's effort to regain the records and other investigative materials Kline had ordered removed and sent to Johnson County . . . .
> . . . .
> In addition, the Court said today that Kline and his subordinates *took all copies of the patient records to Johnson County* when he left the attorney general's office.[106]

Understandably not digesting the ninety-three page opinion,[107] some observers proceeded to publish with the same fallacious disorientation emitted from Keefover's summary.

A. The Mainstream Press

One Topeka reporter termed the opinion "a searing condemnation."[108] Associated Press writer John Hanna called it "a public tongue-lashing," adding: "The most memorable thing about the ruling was scalding language in the 5-2 majority's opinion . . . ."[109] He also understood that the objective of Steve Six was not to further his own investigation, but to end Kline's prosecution. "Planned Parenthood and Six's office, which sided with the clinic had hoped to force Kline to clear his DA's office of everything he'd gathered and give it to Six's office. Such a Supreme Court order would have ended Kline's case against the clinic."[110]

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[106] http://www.kscourts.org/Cases-and-Opinions/supreme-court-summaries/2008/20081205-98747.asp (emphasis added).

[107] *See* Exhibit 87.

[108] Tim Carpenter, *Kline Abortion Prosecution Faulted*, TOPEKA CAP.-J., Dec. 6, 2008, § A1, at 1.

[109] John Hanna, *Analysis: Kansas Ruling on Abortion Resolves Little*, ASSOC. PRESS (Dec. 7, 2008).

[110] *Id*.

"Kansas City Court Rebukes District Attorney Kline," stated the *Kansas City Star* in one headline. Another read: "High Court Sanctions Kline for Handling of Abortion Records." "Kan. Court Orders Abortion Records Returned to AG," read an Associated Press headline. "Kan. Court Knocks ex-AG in abortion case," stated another.[111] The Wichita ABC affiliate, KAKE-TV, headlined its story: "Supreme Court Denies Contempt Proceedings Against Phill Kline."[112] All these headlines missed the core holding of the case—that the Court denied Planned Parenthood's demand for return of the redacted records.

B. Pro-Life Commentary

Pro-life observers noted that the white-hot anti-Kline rhetoric disguised the reality that Kline won the case on the merits. Pro-life writer Jill Stanek noted that Justice Beier "was clearly angry she couldn't find a way to stop the decision. She lashed out at Kline so vehemently that upon first read of the opinion the mainstream media thought Kline lost the case, and reported it so."[113]

Columnist Denis Boyles termed Justice Beier a "liberal extremist," characterizing her "eccentric decision" as "a vitriolic, amateurish rant that was so embarrassing and

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[111] Two headlines, however, were more accurate. *Court Scolds Kline, but Let's Him Keep Records*, WICHITA EAGLE (Dec. 6, 2008); *Despite Harsh Words, Kline Gets to Keep Abortion Records*, KAN. CITY STAR (Dec. 6, 2008). One observer, startled by the discrepancy between the Court's anti-Kline rhetoric and the reality that he won the case on the merits, penned her own misleading headline: *Supreme Court Orders Kline to Move to Arctic, Exchange Law License for Fishing License*, KANSAS REPUBLICAN ASSEMBLY, http://www.kansasra.org/blog/archives/311.

[112] http://www.kake.com/home/headlines/35603074.html.

[113] Jill Stanek, *Pro-Aborts Lose Another Round to Phill Kline*, WND.COM (Dec. 10, 2008), *available at* http://www.wnd.com/2008/12/83214.

articulated with such petty viciousness that the chief justice appended a note to the decision distancing herself from Beier's outburst . . . ."[114] Noting Chief Justice McFarland's comment that the sanction section of the decision was "the very antithesis of restraint and discretion," he stated of Justice Beier: "Her interest was in destroying Kline, something she threatened in her decision."[115] Justice Beier's opinion, he wrote, contained "some of the harshest, most vitriolic language most of us will ever see in a high-court decision." He viewed Justice Beier as "a very angry Sebelius appointee . . . who was apparently fed up with the persistent efforts of Kline to prosecute the abortion providers."[116]

C. Kansas Commentators

1. The Kansas Supreme Court Blog

The *CHPP* opinion not only riled pro-lifers, but also disturbed Kansas legal commentators. The writer of the *Kansas Supreme Court Blog*, a since-discontinued careful commentary on the Court's decisions, noted that the Court ruled "almost entirely in Kline's favor." Not perceiving the falsity of "no records left behind," this legal analyst

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[114] Denis Boyles, *Kline and the Judicial Kangaroos in Kansas*, NATIONAL REVIEW ONLINE (Oct. 18, 2011), http://www.nationalreview.com/corner/280404/kline-and-judicial-kangaroos-kansas-denis-boyles.

[115] *Id*. "Further instances of Kline's improper conduct . . . may yet come to light," wrote Justice Beier, "merit[ing] civil or criminal contempt, discipline up to and including disbarment, or other sanctions." *CHPP v. Kline*, 287 Kan. at 425. Justice McFarland found this attempt to intimidate particularly offensive. *Id.*, 287 Kan. at 433 (McFarland, J., concurring in the result) (strongly disagreeing with the Court's making vague threats about what may "come to light").

[116] Denis Boyles, *News from Courts You've Never Heard Of*, NATIONAL REVIEW ONLINE (Dec. 5, 2008), http://www.nationalreview.com/corner/174462/news-courts-youve-never-heard/denis-boyles.

suggested that had Kline left a copy of the documents in the Attorney General's office, his victory "would have been total."[117] In fact, of course, had Justice Beier told the truth about the records left for the Attorney General, the opinion would have collapsed, sanctions and all. The commentator noted that "the news coverage describes the case the way it does" primarily because of the "sanctions" label.

The writer, himself a lawyer, was appalled at Justice Beier's rhetoric. "In a way," he stated, "the biggest loser in this affair is the Court's reputation. . . . Justice Beier's tone is scathing throughout the opinion. She dislikes Kline and wants you to know it. She mocks his defeat in the Johnson County primary election . . . ."[118] Wondering where this exceptionally unusual vitriol originated, he speculated:

> [P]erhaps Justice Beier is exacting a little payback against Kline for getting the U.S. Supreme Court to trash the opinion she jointly authored in *Kansas v. Marsh*. Perhaps she is more motivated by the abortion cases themselves. Whatever the reason, her rhetorical flourishes may have been satisfying but reveal an obvious antipathy to someone before the court that perhaps should have prompted a recusal.[119]

The Supreme Court Blog's raising of the recusal question indicated that an independent observer believed that Justice Beier was too infused with visceral anti-Kline animus to judge his actions with impartiality. Noting that "this strange case will remain in the

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[117] *Comprehensive Health of Planned Parenthood v. Kline*, KANSAS SUPREME COURT BLOG (Dec. 16, 2008), https://kscblog.wordpress.com/2008/12/page/3/.

[118] *Id*.

[119] *Id.*

Court's publications forever," he stated his intent "to watch future opinions by Justice Beier for repeat performances."[120]

2. The Insights of James O'Connell

Former Secretary of KDHE (1995-1997), James O'Connell, had by far the most trenchant criticism of the opinion, including spotlighting the "no records left behind" fallacy. Like others, he noted the disconnect between the headlines reporting on the opinion and what the Court actually did: "[D]espite all that you may have read in the local press and heard on radio and television, Planned Parenthood *lost* this lawsuit!"[121] Turning to why the Court required Mr. Kline to provide a copy of his investigation files to the Attorney General, he stated:

> The court based this part of its decision on the belief that all copies of the records were transferred and that transfer of the records from the attorney general's office to the Johnson County district attorney's office stood "in the way of his successor doing his job."
>
> Two interesting things are set out in the opinion.
>
> - First, in September 2007 [actually June 25, 2007], some nine months after all the records were transferred to Johnson County, then Attorney General Paul Morrison notified Planned Parenthood that no charges would be filed.
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> - Second, at about the same time [June 28, 2007], Morrison began his action to file misdemeanor charges against Tiller in Sedgwick County, effectively abandoning potential felony charges.

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[120] *Id.*

[121] James O'Connell, *The Kansas Supreme Court's Empty Words*, KANSASLIBERTY.COM (Dec. 19, 2008), http://www.kansasliberty.com/liberty-update-archive/22dec2008/words-without-meaning.

> *If there were no relevant documents left behind for Morrison, on what evidence did he base these two decisions?* This glaring inconsistency is not noted or otherwise addressed in the court's opinion.[122]

Although he did not have the Status and Disposition Report, the King Report, or most of the other evidence distorted or omitted in the Beier opinion, Mr. O'Connell identified the crux of the hoax. He concluded his analysis with an observation about the Court's departure from its ethical obligation of civility.

> Some may suggest that such politically oriented, gratuitous and spiteful comments are unworthy of the state's highest court. The majority, which castigated Kline . . . may want to review its own rules for judicial conduct. They provide that judges should be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others . . . ." [M]uch of the language of this opinion may not comply with this standard.[123]

3. Other Comment

Associated Press correspondent, John Hanna, questioned the propriety of a court that had treated Mr. Kline to a public tongue-lashing then sitting in ultimate judgment on him. "Who would make the final judgment on any punishment? The same Supreme Court issuing a majority opinion declaring, 'Kline exhibits little, if any, respect for the authority of this court or for his responsibility to it and to the rule of law it husbands.'"[124] After analyzing the *CHPP* opinion in light of the record, one has to question the degree of respect Justice Beier has for the integrity of the judicial process and her own

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[122] *Id*. (emphasis added).

[123] James O'Connell, *The Kansas Supreme Court's Empty Words*, KANSASLIBERTY.COM (Dec. 19, 2008).

[124] John Hanna, *Analysis: Kan. Ruling on Abortion Resolves Little*, ASSOC. PRESS (Dec. 7, 2008), quoting CHPP v. Kline, 287 Kan. at 422.

responsibility to the Court on which she sits and "the rule of law it husbands." And one must ask, as one commenter did: "I wonder if the justices that have already made up their minds as to Kline's guilt are going to recuse themselves (based upon bias already expressed publicly) if they do get a request to sanction him."[125]

X. Other Evidence of Animus: Straw Men and a Thousand Cuts

A. The Straw Man Technique

As is documented in great detail above, the *CHPP v. Kline* opinion falsely portrayed Kline as the absconder with records who left Mr. Morrison helpless to investigate—all for the purpose of imposing unwarranted relief and sanctions to divert public opinion from the recognition that Mr. Kline won the case. *CHPP v. Kline* unfortunately is not an aberration, but is typical of Justice Beier's work when she makes judgments about Phill Kline and his work as prosecutor. Nearly as misleading as *CHPP v. Kline* is her *Alpha* opinion, which also falsely depicted Kline as a not-to-be-trusted, renegade and a threat to patient privacy.

Once this Court conveniently made the *Alpha* case public at the filing of the Planned Parenthood brief, local and national media outlets stoked privacy fears. Phill Kline, one writer charged, was engaged in a "fishing expedition" for medical records of underage girls. "Kline just wants the complete unredacted records of 90 private citizens

[125] *Supreme Court Blisters Kline, Orders Return of Abortion Clinic Records*, LJWORLD.COM (Dec. 5, 2008) (by commenter "justthefacts"), http://www2.ljworld.com/news/2008/dec/05/supreme-court-blisters-kline-orders-return-abortio.

of Kansas who, in 2003, made entirely legal decisions at entirely legal facilities."[126] That such children deserved protection from sexual exploitation received no comment. Imagine your "intimate records being turned over to the government for a wide ranging investigation by a prosecutor who is an ardent opponent of abortion," another wrote, seemingly oblivious to the sexual abuse of minors that ready access to abortion can facilitate.[127]

This Court could have put that nonsense to bed with an objective opinion in *Alpha* based on the evidence presented and Kline's own statements about his legitimate prosecutorial purpose. Like the abortion providers' briefs and the attendant media coverage, however, Justice Beier's recitation of the facts either omitted or downplayed the goals of the investigation (prevention of child rape), the probable cause finding by Judge Richard Anderson, who issued the subpoenas, and Mr. Kline's role in crafting a redaction protocol to protect adult patient identities.

Justice Beier's *Alpha* opinion set up straw men up from the opening paragraph: "This is an original action in mandamus…arising out of an inquisition in which respondent Attorney General Phill Kline subpoenaed the entire, unredacted patient files of 90 women and girls who obtained abortions at petitioners' clinics in 2003."[128] Utterly omitted from this opening slice of fright bread is that Judge Anderson issued the

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[126] Jon Carroll, *Editorial*, SAN FRANCISCO CHRONICLE (March 1, 2005).

[127] *Prosecutor's Request Threatens Privacy of Abortion Records*, USA TODAY (March 2, 2005).

[128] *Alpha Med. Clinic v. Anderson*, 280 Kan. 903, 905, 128 P.3d 364 (2006).

subpoenas, and that both the Court and the Attorney General had agreed on a detailed methodology of redaction to protect privacy. Justice Beier later wrote that "Kline ***now*** takes the position that patient identifying information may be redacted,"[129] again ignoring the court-controlled redaction process recommended by Attorney General Kline.

Justice Beier's *Alpha* opinion therefore echoed the deceptive theme pushed by the clinics and unnecessarily added to the campaign by Morrison and others (inflamed by willing media outlets) to frighten adult patients of the clinics. The opinion had its intended media affect. *Kansas' Top Court Limits Abortion Record Search*, headlined the New York Times.[130]

Successful employment of the straw man fallacy depends on fooling the public into believing that the deceptive portrayal is actually true to reality.[131] Utilizing the power and prestige of high judicial office and the trust of her colleagues to create for public consumption a Phill Kline that does not exist, Justice Beier then successfully attacked her artfully-designed caricature to undermine public confidence in the real Phill Kline and to thwart his well-founded investigation of child sex abuse and other crimes of Kansas abortion providers. Like in *CHPP*, Justice Beier in *Alpha* created a Phill Kline that did not exist to destroy the one that did.

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[129] *Id.* at 922 (emphasis added).

[130] Jodi Rudoren, *Kansas' Top Court Limits Abortion Record Search*, NEW YORK TIMES (Feb. 4, 2006).

[131] The straw man technique distorts person A's viewpoint "by presenting it in an exaggerated or one-sided form. This 'straw man' is then attacked and refuted while pretending that it is person A's actual viewpoint." P.J.J. van Veuren, *Fallacious Arguments*, *in* SKILFUL THINKING: AN INTRODUCTION TO PHILOSOPHICAL SKILLS 66 (G.J. Rossouw ed., Craig MacKenzie trans., 1994).

In *State v. CHPP*, 291 Kan. 322, 241 P.3d 45 (2010), Justice Beier reprised the "no records left behind" falsehood of *CHPP v. Kline*, stating that Mr. Morrison had to copy the CHPP records in Judge Anderson's possession "because Kline had left no copies behind in the Attorney General's office." *Id.* at 333. She also signaled to Planned Parenthood a novel way to challenge use of the redacted medical records in the pending Johnson County prosecution: breaks in the chain of custody.

> We note in passing that there appear to have been breaks in Judge Anderson's custody. For example, on October 24, 2006, Kline's staff was permitted to take the clinic patients' redacted records from Judge Anderson and make copies. At another point, Morrison's staff was permitted to do likewise. But we are not asked to address the significance of those breaks in this appeal, and we do not do so.

Id. at 352.

Why is this subject addressed? Setting aside that Justice Beier's "chain of custody" concerns are unfounded from an evidentiary standpoint, the answer can be found in the double effect of her unnecessary detour: more negative publicity about Mr. Kline and a savory evidentiary objection for the abortion providers. In fact, her suggestion has no legal foundation whatsoever. Investigators making copies of documentary evidence are not "breaks" in a chain of custody but rather "links" in a chain of authentication to which they can testify as witnesses. Furthermore, it is not necessary that an object offered into evidence "should have been kept continuously under lock-and-key or continuously sealed up." *State v. McGhee*, 226 Kan. 698, 703, 602 P.2d 1339 (1979) (police officer checking gun out of evidence locker for two hours does not break chain of custody). Furthermore, any alleged deficiency in the chain of custody "should go to the weight rather than to the admissibility of the evidence." *Id.*

"The media are tools to produce cultural infrastructure," Justice Beier wrote in her third-wave article, "a necessary pre-condition to an evolution in the law." Utilizing her position on the Supreme Court to foster a public climate favorable to third-wave values, Justice Beier successfully manipulated facts to produce the media impact she sought, casting winner Phill Kline as the villain, the threat to women's privacy, the absconder with the records. Like the Wizard of Oz pulling the strings on a puppet, Justice Beier beguiled the public into believing they were seeing the real Phill Kline. At the heart of the technique is misrepresentation,[132] creating a fraudulent image and selling it to the public as reality—"cultural infrastructure" that is "a necessary pre-condition to an evolution in the law."

B. Death by a Thousand Cuts

In addition to Justice Beier's manipulation of facts in *CHPP v. Kline* to transform the issues and craft novel and misguided "remedies," the opinion was littered with misrepresentations, key omissions, and other material to portray Mr. Kline as a manipulative (if not dishonest) political extremist. These thousand small cuts included:

- INCLUDED: Significant discussion of Judge Anderson's redaction protocol, concerns of patient privacy, and Mr. Kline's handling of patient medical records, most of which carried an ominous tone about Mr. Kline's conduct. *CHPP v. Kline*, 287 Kan. at 377-79. OMITTED: Mr. Kline initiated his own protocol for protecting patient privacy. Not a single patient identity was ever revealed publicly by Mr. Kline or his staff.

- INCLUDED: A discussion about Mr. Kline's November 3, 2006 appearance on *The O'Reilly Factor* with a tone suggesting that the appearance somehow violated Judge Anderson's order in Alpha. *Id.* at 378-

[132] *See* STANLEY G. ROBERTSON, THE STRAW MAN FALLACY 12 ("At the heart of the Straw Man Fallacy is deception.").

79. OMITTED: What Mr. Kline actually said on *The O'Reilly Factor* or that the appearance did not breach patient privacy or any court order; that the pro-abortion guest was Amy Richards, founder of the Third-Wave Foundation. Ex. 137. *See* also www.thirdwavefoundation.org/amy-richards.

- INCLUDED: Referring to attorney Donald McKinney, whom Kline appointed as special prosecutor shortly before leaving the Attorney General's office, as an "anti-abortion activist." *CHPP v. Kline*, 287 Kan. at 381. OMITTED: Characterizing Sedgwick County District Attorney Nola Foulston as a "pro-abortion activist," *id*., even though she told Mr. Kline that she would not interfere with his prosecution of George Tiller one day before she intervened to dismiss the charges.

- INCLUDED: In discussing Mr. Kline's transfer of WHCS records to Johnson County, the opinion states that Kline "inadvertently disclosed this fact to Judge Anderson," strongly implying that Mr. Kline's goal was to hide the fact from Judge Anderson. *Id.* at 385. OMITTED: Evidence that Mr. Kline voluntarily disclosed the transfer. Anderson 669:19-24.

- INCLUDED: "Kline has admitted more than once. . . that his staff members [had] created summaries of at least three WHCS patient records and have kept and employed those summaries in their activities in Johnson County." *CHPP v. Kline*, 287 Kan. at 385. OMITTED: Having summaries violated no law or court order.

XI. Duties of Other Justices

Having joined Justice Beier's opinion in *CHPP v. Kline* without additional comment, Chief Justice Lawton Nuss, and Justices Marla J. Luckert, Eric S. Rosen and Lee A. Johnson should all arguably recuse themselves from this case for the same reasons addressed above for Justice Beier.

On the other hand, Mr. Kline recognizes a singular ground for disassociating these four justices from the work of Justice Beier and, in fairness, must address it here. Mr. Kline recognizes the possibility that, like Justices Davis and McFarland, Chief Justice Nuss and Justices Luckert, Rosen and Johnson relied on Justice Beier as the author of the

opinion to handle the fact record in an accurate and forthright manner. As noted above, Justices Davis and McFarland adopted the "no records left behind" fallacy even while criticizing the second "sanction" crafted by Justice Beier and her other treatment of Mr. Kline.

Without in any way retreating from his criticism of Justice Beier's opinion for its overt deceptions and injudiciousness, Mr. Kline recognizes that a reliance on her assessment and interpretation of the fact record may have led the other four justices to join the harsh rhetoric and untruthful arguments. Misplaced trust is not grounds to challenge a justice's impartiality. If legitimately deceived by her opinion, however, Justice Beier's four *CHPP* colleagues have a duty to report that fact to the Judicial Qualifications Commission. "A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority." Kansas Code of Judicial Conduct R. 2.15(A). As another state supreme court has stated:

Understandably, judges who work closely together in a collegial setting instinctively shrink from reporting a breach of ethics within their bench. If Justice Beier's colleagues, however, are really innocent victims of her scheme to defame Mr. Kline, they have an obligation to hold her to account. "Ignoring or denying known misconduct among one's judicial colleagues . . . undermines a judge's responsibility to participate in efforts to ensure public respect for the judicial system." *Id.* cmt. 1.

Alternatively, if Chief Justice Nuss and Justices Luckert, Rosen and Johnson understood Justice Beier's manipulation of the fact record and willingly assented to it, they should also recuse.

PART TWO:
RECUSAL OF CHIEF JUSTICE LAWTON NUSS

In 2006, Chief Justice Lawton Nuss was formally admonished by the Kansas Commission on Judicial Qualifications for his participation in a meeting with the President of the Kansas Senate about pending school finance litigation. Affidavit of Phillip D. Kline, ¶ 18.

A group of Kansas school districts were plaintiffs in that litigation. The Governor of Kansas and the State Board of Education were named defendants. As Attorney General, Mr. Kline represented the state of Kansas. *Id.*

Justice Nuss did not inform anyone of the meeting, where he discussed whether proposed education financing legislation might meet with Supreme Court approval. The meeting occurred after the Kansas Supreme Court had ruled that the existing Kansas finance scheme was unconstitutional and during the time period that the Supreme Court had given the Governor and the legislature to approve new legislation without facing a court sanction. *Id.* ¶ 19.

After receiving a report about the meeting from members of the Kansas legislature and concluding that it was a judicial impropriety for the Chief Justice to have participated in it, Attorney General Kline conducted an informal investigation to confirm that the

meeting had occurred and then filed a complaint with the Kansas Commission on Judicial Qualifications. The formal admonishment of the Chief Justice followed. *Id.* ¶ 20.

Mr. Kline's complaint that led to the formal admonishment of Chief Justice Nuss was in no way grounded in personal animosity toward the Chief Justice, nor has Mr. Kline ever discerned any personal animosity[133] from the Chief Justice in their limited contact since then. Still, there is the opportunity and potentially the appearance of retribution by the Chief Justice should he participate in the review of Mr. Kline's ethics case and come down in favor of sanctions. *Id.* ¶ 21. For that reason, and wholly independent of the reasons stated in Part One and Part Two of this motion, Mr. Kline submits that the Chief Justice's recusal from this case is appropriate.

PART THREE:
MEMORANDUM OF LAW

I. Kansas Law on Recusal

Kansas has a carefully articulated law for disqualification of trial judges. K.S.A. 20-311d. Although no specific statute addresses recusal of appellate judges, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Kansas Code of Judicial Conduct R. 2.11(A). This rule is mandatory[134] and applies to the Supreme Court.[135] Because the impartiality

[133] The term "personal animosity" used here is to be distinguished from whatever role the Chief Justice played in the *CHPP v. Kline* opinion and other abortion-related litigation that brought Mr. Kline and his staff before the Kansas Supreme Court.

[134] "When this Code uses 'shall' or 'shall not,' binding obligations are imposed, the violation of which can result in disciplinary action." Scope, ¶ 5, Kan. Code of Judicial Conduct.

language in the Kansas Code of Judicial Conduct is the same as that in federal law, "federal cases offer guidance in their interpretation of 28 U.S.C. § 455(a) (1982), which also requires disqualification if the judge's impartiality might reasonably be questioned." *State v. Logan*, 236 Kan. 79, 86, 689 P.2d 778 (1984). The standard is an objective one, not dependent upon the judge's subjective perception. *State v. Robinson*, 270 P.3d 1183, 1204 (Kan. 2012). "The standard which federal courts use is whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality . . . in the mind of a reasonable person with knowledge of all the circumstances." *Logan*, 236 Kan. at 86. *See United States v. Cooper*, 283 F. Supp. 2d 1215, 1223 (D. Kan. 2003) ("The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality.") (quoting *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 659-660 (10th Cir. 2002). *See also* Brian Flanagan, *Scalia, Hamdan, and the Principles of Subject Matter Recusal*, 19 DENNING L.J. 149, 169 (2007) ("[T]he reasonable person has a right to be confident that her jurisdiction's legal system operates impartially.").

II. Reasonable Observers

The Kansas Supreme Court blog and former KDHE Secretary James O'Donnell fairly represent the reasonable person with knowledge of the circumstances. Neither is a partisan on the life issue. Both are trained lawyers and experienced observers of the Kansas Supreme Court. Both were appalled at Justice Beier's opinion for the Court in

[135] "The Canons state general principles of judicial ethics that all judges must observe." Scope, ¶ 2, Kan. Code of Judicial Conduct. The term "judge" includes Kansas Supreme Court Justices. Application, § (I)(B), Kan. Code of Judicial Conduct.

CHPP v. Kline. The Blog author recognized Justice Beier's unmistakable personal animus towards Mr. Kline. Perceiving that her animosity arose from an extrajudicial source, he speculated that the opinion served as payback for the reversal in *Kansas v. Marsh*, or else arose from her personal views on abortion. In any case, the scathing tone and gratuitous rhetoric "reveal an obvious antipathy to someone before the court that perhaps should have prompted a recusal." As a reasonable objective observer, what would he have thought had he known that the underlying premise of "no records left behind" was itself a fraud?

Mr. O'Connell, another "reasonable person on the street," *Logan*, 236 Kan. at 86, questioned whether Mr. Morrison could have exonerated Planned Parenthood and charged Dr. Tiller if Mr. Kline had absconded with all the records. He suspected the ruse, but like the Blog writer, felt that the disrespectful language itself violated the Canons. "[S]uch politically oriented, gratuitous and spiteful comments," he wrote, "are unworthy of the state's highest court" and offended the requirement that judges be "patient, dignified, and courteous to litigants." Kansas Code of Judicial Conduct R. 2.8(B). Another reasonable observer is Mr. John Hanna, the Associated Press reporter. He wondered at the propriety of the Court that had condemned Mr. Kline for lacking respect for the Court and the "rule of law it husbands" sitting in judgment to punish him in a disciplinary proceeding. Had the Court not already prejudged the matter by its harsh rhetoric and referral of its opinion to the Disciplinary Administrator?

In the mind of reasonable observers of the *CHPP* case, Justice Beier had lost her objectivity. Chief Justice McFarland noted her lack of "restraint and discretion" and the

injudicious threat of future sanctions "up to and including disbarment." Thus, the requirement for disqualification when a judge's "impartiality might reasonably be questioned" would seem to mandate Justice Beier's recusal from this appeal, which arises from the same facts as *CHPP*. However, a United States Supreme Court decision, interpreting 28 U.S.C. 455(a), may indicate otherwise.

III. Applying *Liteky*

In *Liteky v. United States*, 510 U.S. 540 (1994), the Court asked whether a judge could be disqualified for statements and rulings made solely during a judicial proceeding. Prior to *Liteky*, a general theme of recusal law was that only extrajudicial influences could warrant recusal. What the judge learned in the proceeding itself, regardless of how expressed, did not disqualify him. "As a general rule, bias or prejudice that is caused by occurrences in the context of a court proceeding is not grounds for disqualification." Shaman, Lubet & Alfini, *Judicial Conduct and Ethics* § 4.05 (3d ed. 2000) (quoted in *In re Platt*, 269 Kan. 509, 531, 8 P.3d 686 (2000). The *Liteky* court, however, modified the absoluteness of the "extrajudicial source" doctrine. Even opinions arising strictly from participation in a judicial proceeding could warrant recusal if "they display *a deep-seated favoritism or antagonism* that would make fair judgment impossible." *Liteky*, 510 U.S. at 555 (emphasis added).

The Court acknowledged a "pervasive bias" exception for "unsuppressible judicial animosity" arising in a judicial proceeding. *Id.* at 445, 451. One commentator observed:

> While a judge will not normally be disqualified on the basis of bias unless it is shown that such bias derived from an extrajudicial source, it has been held that, where a litigant can demonstrate that a challenged judge has said or done

> something in her judicial role that reflects such a degree of animus as to manifest that the judge has developed a closed mind, disqualification may be warranted, even where the source of the judge's bias was wholly judicial.

Richard E. Flamm, *Judicial Disqualification* § 4.13 (2007). *See Plummer v. United States*, 870 A. 2d 539, 547 (D.C. 2005) ("[S]howing that a judge's alleged prejudice comes from an extrajudicial source may not be required when the circumstances are so extreme that a judge's bias appears to have become overpowering.") (internal quotation marks and citation omitted).

In *CHPP*, Justice Beier's enmity not only surmounted the "deep-seated antagonism" threshold of *Liteky* for intrajudicial bias, but also arose from an extrajudicial ideological commitment that drove her to distort the facts to Mr. Kline's detriment. The reasonable observer would be aware of Justice Beier's commitment to third-wave feminism with its philosophical nihilism, abhorrence of traditional family values, and endorsement of media manipulation to effect legal change. The reasonable person would also know that Justice Beier concealed the truth that Mr. Kline had left a full set of records for Mr. Morrison. Justice Beier's purpose, arising from deep-seated and unequivocal antagonism to Mr. Kline, was to blacken his reputation in the eyes of the public, and force him to provide Planned Parenthood with confidential prosecutorial records not even at issue in the case. If such abuse of judicial office does not mandate recusal, the Code of Judicial Conduct is meaningless. Although "nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient," *Berger v. United States*, 255 U.S. 22, 36 (1921), this case is one of those rare

instances where a judge manifestly harbors a "hostile feeling or spirit of ill will against one of the litigants." *State v. Foy*, 227 Kan. 405, 411, 607 P. 2d 481 (1980).

Although Justice Beier accused Mr. Kline of "poison[ing] the well of judicial and public opinion against CHPP," *CHPP v. Kline*, 287 Kan. at 424, that allegation seems better to describe her own personal animus against Mr. Kline. Likewise, her assertion that Kline's actions "seriously interfered with this court's efforts to determine the facts" seems ironic in view of her deliberate and successful effort to misrepresent the facts. Where a judge had signed a petition opposing picketing of funerals, the appeals court removed her from a case in which the picketers were a defendant. *St. David's Episcopal Church v. Westboro Baptist Church, Inc*., 22 Kan. App. 2d 537, 556, 921 P. 2d 821 (1996). Although the Court did not detect "any hostile feelings or a spirit of ill will," the Court ordered recusal "to avoid 'even the appearance' of bias." *Id.* The facts in *CHPP*, being far more egregious, displayed not only ill will, but a concerted design to subvert the judicial process to satisfy the judge's hostility. *See Whitaker v. McLean*, 118 F. 2d 596 (D.C. Cir. 1941) ("Hostility is a form of bias."). Justice Beier's antagonism to Mr. Kline in *CHPP* not only made fair judgment impossible, but guaranteed an unjust outcome, thus creating a disqualifying appearance of partiality. Additionally, *CHPP* arose out of the same facts that underlie this appeal, and was in fact submitted to the Disciplinary Administrator as evidence for use in this proceeding. *See CHPP v. Kline*, 287 Kan. at 425 ("[A] copy of this opinion will be forwarded to the disciplinary administrator.").

Although a judge is not expected to be a tabula rasa, *Laird v. Tatum*, 409 U.S. 824, 835 (1972), an unsubstantiated suggestion of bias is insufficient to warrant recusal,

Willner v. Univ. of Kansas, 848 F.2d 1023, 1027 (10th Cir. 1988), and "charges of disqualification should not be made lightly," *Aetna Life Ins. Co. v. Lavoie*, 475 US 813, 826-27 (1986), Justice Beier's manipulation of the CHPP opinion—undetected by her colleagues—evinces a systemic hostility towards Mr. Kline. The concealment of facts to manufacture a non-existent "no records left behind" scenario was compounded by the pervasively derisive rhetoric in the opinion, noted by every outside observer. *See United States v. Donato*, 99 F.3d 426, 435 (D.C. Cir. 1996) (finding that the extent of the Court's hostility towards defendant and her counsel crossed the *Liteky* threshold, demonstrating such a high degree of antagonism as to make fair judgment impossible); *In re IBM Corp.*, 45 F. 3d 641, 644 (2d Cir. 1995) (finding it "manifestly clear" based on judicial and extrajudicial actions that a reasonable observer would question the judge's impartiality).

Ultimately, judicial disqualification cases "are extremely fact driven and must be judged on their unique facts and circumstances more than by comparison to situations considered in prior jurisprudence." *Nichols v. Alley*, 71 F. 3d 347, 351 (10th Cir. 1995). Justice Beier's subversion of the *CHPP* opinion, and her likely duping of her colleagues in the process, renders her unfit to sit on this case in the eyes of any reasonable observer. Justice Beier cannot be trusted to present the facts honestly if they do not support her preconceived ideological outcome. "Findings by a trial judge unsupported by the record are evidence that the judge has relied on extrajudicial sources in making such determinations indicating personal bias and prejudice." *Peacock Records, Inc. v. Checker Records, Inc.*, 430 F.2d 85, 89 (7th Cir. 1970). Similarly, findings by an appellate court in an original mandamus proceeding that conceal facts of record, including those developed

by its own master, indicate reliance on extrajudicial sources including personal bias and prejudice.

The appearance of partiality is blatant. In any event, if the question "is a close one, the balance tips in favor of recusal." *Nichols*, 71 F. 3d at 352.

IV. The Rule of Necessity

In a court of last resort, the Rule of Necessity may counsel against recusal. *See United States v. Will*, 449 U.S. 200, 213 (1980) (Judges, otherwise disqualified, may hear a case "if the case cannot be heard otherwise.") (quoting F. Pollack, *A First Book of Jurisprudence* 270 (6th ed. 1929)). Kansas has a similar rule. "[A]ctual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated." *State ex rel. Mitchell* v. *Sage Stores Co.*, 157 Kan. 622, 629, 143 P. 2d 652 (1943).

In *Sage*, the Court noted that Kansas law did not provide for appointment of a substitute judge on the Supreme Court to replace one disqualified. *Id*. That problem no longer exists. A retired justice or judge may be designated "in connection with any matter pending in the supreme court." K.S.A. 20-2616. Additionally, the Supreme Court may assign a judge of the court of appeals or a district judge to serve temporarily on the supreme court. K.S.A. 20-3002(c); Kan. Const. art. III, § 6(f). Thus, disqualification of Justice Beier, or her four colleagues, for an appearance of partiality need not hinder this appeal from being heard.

V. Due Process Considerations and the Appearance of Fairness

Whether the issue is framed in terms of judicial ethics, fostering confidence in the courts, procedural due process, or merely avoiding the appearance of impropriety, prevailing legal authority requires the recusal of Justice Beier and, absent mitigating explanations, the recusal of the other justices who joined her *CHPP v. Kline* opinion.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.

In re Murchison, 349 U.S. 133, 136 (1955).[136]

In *Anderson v. Sheppard*, 856 F2d 741, 745 (1988), the Sixth Circuit cited the passage from *In re Murchison* and further stated:

> The judge should exercise self-restraint and preserve an atmosphere of impartiality. When the remarks of the judge during the course of the trial, or [her] manner of handling the trial, clearly indicate a hostility to one of the parties, or unwarranted pre-judgment of the merits of the case, *or an alignment on the part of the court with one of the parties* for the purposes of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting judgment in favor of the party so favored . . . .

Id. The Court later stated:

[136] The "circumstances and relationships" factor bears on the special recusal issue for Chief Justice Nuss. Although Mr. Kline knows of nothing the Chief Justice has done (outside of joining the CHPP opinion) to suggest that he harbors ill-will toward Mr. Kline from his past disciplinary sanction, an objective observer will quickly suspect that retribution was a factor should the Chief Justice vote to uphold any meaningful sanction against Mr. Kline from the panel decision.

> [T]he neutrality requirement serves *dual* purposes. It not only serves to preserve a fair trial, it also exists to engender public faith in the fairness and integrity of our tribunals. Not only must litigants receive a fair trial, they must also believe that they have been given a fair trial.
>
> It is for the second reason that we require not only an absence of actual bias, but an absence of even the appearance of judicial bias.

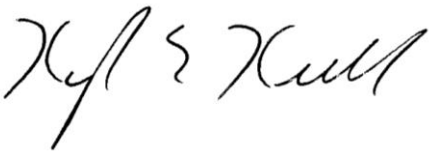
Id. at 746.

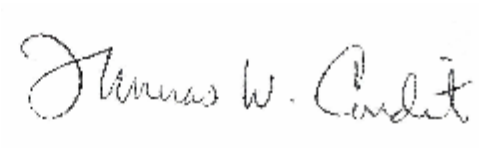
As another state supreme court explained: "The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. A democratic society that, like ours, leaves many of its final decisions, both constitutional and otherwise, to its judiciary is totally dependent on the scrupulous integrity of that judiciary." *In re Fadeley*, 802 P.2d 31, 40 (Or. 1990).

PART FOUR:
CONCLUSION

Justice Beier unfortunately let her personal hostility to Mr. Kline overwhelm her duty of impartiality to the degree that she crafted the *CHPP* opinion to deceive her own colleagues. That Chief Justice McFarland and Justice Davis were misled is obvious from their concurrences. That no other Justice, having reviewed these circulations, wrote a separate opinion to clarify the facts, indicates that Justice Beier either succeeded in misleading all the Justices or that one or more endorsed her deception *sub silentio*. Without the "no records left behind" theme, the *CHPP* opinion would have lacked the "other appropriate relief," the sanction, and the public opinion impact as a defeat for Mr. Kline. Justice Beier's descent into abject dishonesty to advance a personal ideology arguably disqualifies her not just from sitting on this appeal, but for judicial office per se.

Respectfully submitted,





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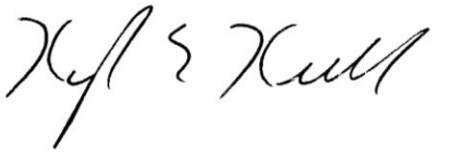
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2012, a copy of this motion was served by personal service upon:

Mr. Stanton A. Hazlett, Disciplinary Administrator
Mr. Alexander M. Walczak, Deputy Disciplinary Administrator
701 S.W. Jackson, 1st Floor
Topeka, Kansas 66603



Kyle E. Krull, Attorney

Appeal No. 11-106870-S
IN THE SUPREME COURT OF KANSAS

IN THE MATTER OF	:	
	:	**DA10088 and DA10598**
PHILLIP D. KLINE, **Respondent.**	:	
	:	

AFFIDAVIT OF RESPONDENT PHILLIP D. KLINE
IN SUPPORT OF MOTION FOR RECUSAL

COMMONWEALTH OF VIRGINIA)
) **ss**
CITY OF LYNCHBURG)

Respondent Phillip D. Kline, having been first duly sworn, hereby states the following based upon his personal knowledge and belief:

1. I am submitting this affidavit in support of my motion for recusal of Justice Carol Beier and four other Justices on the Kansas Supreme Court.

2. From January 2003 until January 2007, I served as the elected Attorney General for the State of Kansas. From January 2007 until January 2009, I served as District Attorney for Johnson County, Kansas. During my terms in both of those offices, I conducted investigations into the practices of Kansas' abortion providers to determine if they complied with Kansas law on the duty to report suspected injurious

child abuse (including statutory rape of minor girls) and Kansas late term abortion restrictions.

3. I obtained probable cause findings from every judge who reviewed the evidence obtained in the investigation. To the extent that I sought or obtained medical records of abortion patients, my staff and I made it a priority to protect patient privacy. I designed and implemented an investigative approach which called for all adult patient identities to be redacted from any abortion clinic records prior to the production of those records to my office. I sought the identities of children from the beginning of the investigation as the child patients were victims of crime. The investigation, at our request, was initially private until an order of this Court made it public with the filing of the abortion clinic briefs in February of 2005.

4. In the November 2006 election, Paul Morrison was my challenger for the Office of Kansas Attorney General. Mr. Morrison's campaign ads falsely led the public to believe that I was mishandling patient medical records and threatening to disclose them to the public. Morrison's television ad claimed that I wanted "our personal medical information in the government's hands. And, November 7th, it's in our hands to stop him." Those accusations were always a spectacular falsehood, as not a single patient's identity was ever revealed by my office. Moreover, the extensive record in this matter does not contain any evidence that I or my staff ever allowed anyone to view the redacted records, except for legitimate law enforcement purposes. Also, the subpoena of medical records is common in criminal investigations and prosecutions. The investigation design and anticipated manner of production of the

records in this case, however, was unique due to my efforts to protect adult patient privacy. Rather than producing the records directly to my office, as is common in law enforcement, the original subpoena called the records to be produced to Judge Anderson so that adult patient identities may be redacted. The subpoena was drafted in this fashion at my request.

5. After Morrison prevailed in the November 2006 election, Johnson County Republican precinct committee persons selected me to fulfill the remainder of Morrison's term as Johnson County District Attorney. Comprehensive Health of Planned Parenthood of Kansas and Mid-Missouri, Inc. ("Planned Parenthood" or "CHPP") is located in Johnson County and performed abortions there.

6. Mr. Morrison was extraordinarily hostile to my serving as Johnson County District Attorney and to my staff as we attempted a transition between offices. His hostility after the election, combined with his campaign promise to end the investigation of the abortion clinics, persuaded me that I had to make another set of the redacted records (previously obtained by lawful subpoena and with court approval) for use in Johnson County. I knew that if I left everything with Morrison, I would never see the records again and would have to initiate new subpoenas in Johnson County, after devoting significant state resources responding to extraordinary mandamus actions filed by the abortion clinics. My concerns regarding Mr. Morrison's willingness to cooperate were later confirmed when I requested his assistance on two occasions and was rebuffed both times.

7. Law enforcement routinely shares investigative information with other law enforcement offices. Judge Anderson was aware that I intended to share the evidence with prosecutor's offices in Shawnee, Sedgwick and Johnson counties. Such sharing is in no way improper, and—as Judge Anderson informed this Court in *Kansas ex rel. Six. v. Anderson*—is a "quintessential prosecutorial function."

8. Because of Morrison's overt hostility and the unique nature of political transitions my staff and I had to take careful steps to copy and secure records during my transition to Johnson County. Having no knowledge or control over who would have access to the Attorney General's Office during the transition, and concerned about access to the records by movers, employees of the Kansas Department of Administrative Services, and possibly others, my staff decided against leaving any sensitive records there. My staff did, however, leave a copy of every record previously obtained with Judge Anderson and with Shawnee County District Attorney Robert Hecht, with some less sensitive records left in the Attorney General's office. Judge Anderson maintained the originally produced redacted clinic records. Moreover, Mr. Maxwell filed a report detailing where every copy of every record and the originals were located. Mr. Morrison and his staff had access to this report and knew within hours of taking office the location of all of these records. No one denied Morrison or his staff access to records necessary for him to complete any review of their contents.

9. Upon information and belief, Judge Anderson notified Attorney General Paul Morrison on his second day in office that those records were available to Morrison.

Morrison staffers picked them up the following day. Morrison also had access to the entire digital investigation file on the computer system of the Office of Attorney General. Any claim that I attempted to deny Attorney General Morrison access to those records or otherwise impede him from doing his job as Kansas Attorney General is false and not supported by the record.

10. Morrison, however, was not content with having access to the investigation file and the originally produced redacted medical records. His intent, as evidenced by his numerous motions, participation in two mandamus actions, and other conduct was to prevent any further investigation or prosecution of CHPP. Mr. Morrison took the legal position that any evidence obtained pursuant to the *Alpha* subpoenas must remain perpetually in the office of Attorney General. This is the same legal position maintained by CHPP in *CHPP v. Kline* and is a legal argument rejected by this Court.

11. Mr. Morrison's legal position is particularly ironic when one considers his legal position regarding the charges I filed against Dr. Tiller. Those substantive charges were dismissed the day after they were filed at the request of District Attorney Nola Foulston who argued that the Office of Attorney General did not have legal jurisdiction to file those charges. I immediately appealed the dismissal. However, upon assuming office Mr. Morrison dismissed the appeal and agreed with Ms. Foulston's position. Accordingly, in *CHPP v. Kline* Mr. Morrison was taking the position that the office which did not have jurisdiction to file charges was the only office which had the legal right to possess the incriminating evidence supporting the filing of charges.

12. Mr. Morrison insisted on having every existing copy of every redacted medical record and the investigation file. He therefore demanded that I return to him all of the evidence possessed by my Johnson County office relating to both the investigation of George Tiller and the investigation of CHPP. I refused Morrison's demand and Judge Anderson upheld my refusal.

13. Mr. Morrison next sued Judge Anderson to force him to disgorge the redacted medical records. He also joined CHPP in suing me to force my office to disgorge all copies of the redacted medical records. Morrison denied me state representation in the case that he filed against me, forcing me to personally incur more than $200,000 in legal fees simply to keep evidence of criminal activity in the custody of the county office having the jurisdiction to pursue criminal charges based on that evidence. Morrison and CHPP failed in both lawsuits but the delays and costs were extremely prejudicial to the legitimate exercise of prosecutorial authority.

CHPP v. KLINE

14. On June 6, 2007, Planned Parenthood filed a petition for mandamus in this Court seeking to compel me to return the records that I had obtained by subpoena while Attorney General. On September 4, 2007, this Court permitted Morrison to intervene on the side of Planned Parenthood in the mandamus action. Morrison sought the same relief that Planned Parenthood did—that my copy of the redacted CHPP patient records be returned to the Attorney General's office.

15. This Court then put the entire case under seal and subjected me and my staff to extensive discovery and testimony for the benefit of Planned Parenthood and

Morrison, much of which was later misrepresented in Justice Beier's *CHPP v. Kline* opinion,[1] and ultimately used to support ethics charges lodged against me by this Court.

16. Justice Beier's opinion in *CHPP v. Kline,* like her other opinions, distorted the realities of our investigative focus by repeatedly imputing wrongful conduct and motives to me and my staff. She created these impressions by factual omissions, juxtaposition of unrelated facts, and misleading phraseology, always painting me and my staff in the worst possible light. Many of Justice Beier's distortions—documented from the fact record—are set forth in the recusal motion.

17. As Johnson County District Attorney, I filed criminal charges against Planned Parenthood in October of 2007 after enduring much burdensome litigation clearly designed to stymie the prosecution. Justice Beier's *CHPP v. Kline* opinion improperly impugned my motivation for seeking to file those charges and, in that portion of her opinion, ignored the involvement of a District Judge in approving the filing of the charges. Justice Beier's claim came after this Court was informed by Judge Anderson in *Kansas ex. rel. Six v. Anderson* that the redacted records contained "evidence of crimes" which apparently, in context, indicated that someone associated with CHPP had "committed a felony to cover up" misdemeanor crimes. Judge Anderson testified and informed this Court that the records CHPP claimed to be copies of their Termination of Pregnancy Reports did not match up to the original records maintained by KDHE. To emphasize this point, Judge Anderson provided the Court a sampling of

[1] 287 Kan. 372, 197 P.3d 370 (2008)

the evidence and informed the Court that a handwriting expert confirmed his concerns. I filed charges against CHPP in Johnson County only after Johnson County District Court Judge James Vano reviewed the evidence and found probable cause to believe that Planned Parenthood committed 23 felonies and 84 misdemeanors involving 29 abortions.

DISCIPLINARY ACTION INVOLVING JUSTICE NUSS

18. In 2006, Chief Justice Lawton Nuss was formally admonished by the Kansas Commission on Judicial Qualifications for his participation in a meeting with a member of the legislature during school finance litigation titled *Montoy, et al. v. Kansas*, Docket No. 92,032. A group of Kansas school districts were plaintiffs in that litigation. The Governor of Kansas and the State Board of Education were named defendants. As Attorney General, I represented the State of Kansas.

19. My understanding is that Justice Nuss did not inform anyone of the meeting. The meeting occurred after the Kansas Supreme Court had ruled that the existing Kansas finance scheme was unconstitutional and during a time period that the Supreme Court had allowed for the Governor and the legislature to approve new legislation without facing a court sanction.

20. After receiving a report about the meeting from members of the Kansas legislature, my staff and I concluded that Justice Nuss' participation in such a meeting may have been a judicial impropriety. Rather than proceed on unsubstantiated rumors, I directed my staff to complete an informal investigation to determine if any such interaction occurred. My staff confirmed that the meeting had occurred. Without

notifying the public or media and consistent with my duty to report an apparent ethical violation which comes to my attention, I directed my staff to file a complaint with the Kansas Commission on Judicial Qualifications. The formal admonishment of the Chief Justice followed.

21. My complaint that led to the formal admonishment of Chief Justice Nuss was in no way grounded in personal animosity toward the Chief Justice, nor have I ever discerned any personal animosity towards me from the Chief Justice in our limited personal contact since then. Still, there is the opportunity for, and potentially the appearance of, retribution by the Chief Justice should he participate in the review of my ethics case and come down in favor of sanctions.

Further Affiant sayeth naught.

Phillip D. Kline

Sworn to and subscribed before me this 8th day of May 2012

NOTARY PUBLIC

CAROL J. CORDLE
Notary Public
Commonwealth of Virginia
7095079
My Commission Expires Jul 31, 2015