

Retired Oregon Circuit Court and Appellate Judges
Urge the Legislature to Pass SB 807

Dear Members of the Oregon Legislative Assembly:

We are retired circuit court and appellate judges from across Oregon who have joined together to urge the Oregon Senate to pass SB 807. The following views are personal and are not those of any court or organization with which we may be associated.

As retired circuit court judges from urban and rural communities across the state and retired Court of Appeals judges and Supreme Court justices, we have had the honor of serving our communities for many decades. Collectively we have a wealth of experience about the functioning of Oregon's trial court system. As permitted by our judicial code of conduct, we are speaking out in favor of SB 807 because its passage is important to the administration of justice and judicial independence.

Oregon's current judge disqualification laws embody an important principle for both the legislature and the judiciary: to ensure that all litigants receive fair and impartial trials, and to maintain the public confidence in the judicial system. However, because an attorney may remove a judge under these laws simply upon a belief of bias, the law is subject to abuse that erodes the public's confidence and threatens the independence of the judiciary. Such abuse may occur when a district attorney's or public defender's office removes an elected judge from every criminal case without regard for the party or the facts of the case. Public confidence in the judicial system is compromised because the people elected the judge, now disqualified, to hear the community's cases and one lawyer has thwarted the people's will. With such sweeping disqualifications, a lawyer should have to prove the judge lacks impartiality before removing a duly elected judge.

Similarly, this ability to remove judges from large swaths of cases without good cause threatens judicial independence, a keystone of democracy. Judicial independence provides judges with the ability to perform their duties free of influence or control by other actors. But when lawyers do not have to provide facts establishing a judge's lack of impartiality, judges are left to question whether the blanket-disqualified judge is being removed because of judicial philosophy or prior rulings on questions of law. If this is the case, it seriously undermines the principle of judicial independence and the appearance, if not the reality, of judicial impartiality.

Oregon's current process for challenging a disqualification does not provide a realistic opportunity for a judge to contest a disqualification. Under ORS 14.260(1), a circuit court judge can only challenge a disqualification by proving that the attorney's *belief* that the judge can't be impartial is *in bad faith*, a virtually impossible task. *See Kafoury v. Jones*, 315 Or 201, 210 (1992) ("there may be *rare* cases in which a party's sincere belief that it cannot receive a fair and impartial hearing before a particular judge is *so irrational* that permitting the party to succeed on the basis of that belief would be tantamount to reinstating the "peremptory challenge")(emphasis added). Most judges will simply yield rather than attempt to disprove a lawyer's *belief* of prejudice. Indeed, judges who have been subject to blanket disqualifications are discouraged from challenging them because of this virtually insurmountable burden of proof.

SB 807 provides a new well understood process to address disqualifications that significantly affect the administration of justice: i.e., those filed by district attorney's or public defender's offices in most if not all their cases. Such "blanket disqualifications" effectively deny a judge assignment to a criminal docket, often well over half a court's caseload. In recent years, attorneys have filed such disqualifications in Jackson, Klamath, Lake, Lane, Multnomah, Umatilla, Union, Wallowa, Wasco and Washington counties. They disrupt court operations, allow judge shopping, and increase costs when the judicial department is required to send judges from outside the area to accommodate the needs of a community. They also thwart the will of voters by preventing a duly elected judge from hearing cases which the voters intended that judge to hear.

An objective inquiry such as that in SB 807 is already used by two-thirds of the states and federal courts *every time* a lawyer seeks to remove a judge. It requires the lawyer to provide facts that, at a minimum, show that a reasonable person would perceive the judge as lacking impartiality. Under SB 807, when an attorney (or attorney's office) files a motion or series of motions that effectively denies a judge assignment to a criminal docket, the presiding or disqualified judge *may* require the lawyer to prove that a reasonable person would perceive the judge as lacking impartiality. SB 807 provides independent oversight, allowing a disinterested judge to take appropriate action which may include mediation and other actions to resolve the conflict.

This bill strikes a good balance between important values: protecting litigants' right to a fair trial, facilitating the administration of justice, and promoting judicial independence.

Thank you for your consideration.

Hon. Pamela L. Abernethy, Senior Judge, Marion County

Hon. Rex Armstrong, Senior Judge, former Oregon Court of Appeals Judge

Hon. Raymond R. Bagley, retired Circuit Court Judge, Clackamas County

Hon. Richard C. Baldwin, Senior Justice, Oregon Supreme Court,
Former Circuit Court Judge for Multnomah County

Hon. Glen Baisinger, retired Circuit Court Judge, Linn County

Hon. Douglas Beckman, Senior Circuit Court Judge, Multnomah County

Hon. Linda Bergman, retired Circuit Court Judge, Multnomah County

Hon. Henry Breithaupt, retired Oregon tax court judge, pro tem Circuit Court Judge

Hon. William Dan Bunch, retired Circuit Court Judge, Klamath County

Hon. Suzanne Chanti, Senior Circuit Court Judge, Lane County

Hon. William D. Cramer, Senior Judge, retired Circuit Court Judge, Grant and Harney Counties

Hon. Deanne L. Darling, Senior Circuit Court Judge, Clackamas County

Hon. Don A. Dickey, retired Circuit Court Judge, Marion County

Hon. Julie E. Frantz, Senior Circuit Court Judge, Multnomah County

Hon. James Lee Fun Jr., Senior Judge, former Circuit Court Judge, Washington County
Hon. W. Michael Gillette, retired Justice, Oregon Supreme Court
Hon. Robert D. Herndon, Senior Judge, Clackamas County
Hon. Mary Mertens James, Senior Judge, Marion County
Hon. Nely Johnson, Senior Circuit Judge, Multnomah County
Hon. Henry Kantor, Senior Circuit Judge, Multnomah County
Hon. Jerome E. LaBarre, Senior Circuit Judge, Multnomah County
Hon. Paul J. Lipscomb, Senior Judge, former Marion County Circuit Court Judge
Hon. Angel Lopez, Senior Judge, retired
Hon. Rick J. McCormick, Senior Circuit Court Judge, Linn County
Hon. Eve L. Miller, Senior Circuit Court Judge, Clackamas County
Hon. Robert Nichols, retired Circuit Court Judge, Lake County
Hon. Rebecca G. Orf, retired Circuit Court Judge, Jackson County
Hon. Roxanne Burgett Osborne, Senior Circuit Court Judge, Klamath County
Hon. Keith Raines, Senior Circuit Court Judge, Washington County
Hon. Robert W. Redding, Senior Circuit Court Judge, Multnomah County
Hon. James Rhoades, retired Circuit Court Judge, Marion County
Hon. Leslie M. Roberts, Senior Judge, former Circuit Court Judge, Multnomah County
Hon. Ilisa Rooke-Ley, Senior Judge, former Circuit Court Judge, Lane County
Hon. Greg Silver, retired Multnomah County Circuit Court Judge
Hon. Lane Simpson, retired Circuit Court Judge, Lake County
Hon. Janet Stauffer, Senior Judge, retired Circuit Court Judge, Hood River, Wasco, Sherman,
Gilliam and Wheeler Counties
Hon. Diane I. Stuart, Senior Circuit Court Judge, Multnomah County
Hon. Katherine Tennyson, Senior Judge, Multnomah County
Hon. Ronald D. Thom, retired Senior Judge and Circuit Court Judge, Clackamas County
Hon. Kirsten Thompson, Senior Circuit Court Judge, Washington County
Hon. Pierre Van Rysselberghe, retired Circuit Court Judge, Lane County
Hon. Kenneth L. Walker, Senior Circuit Court Judge, Multnomah County
Hon. Jeffrey Wallace, retired Circuit Court Judge, Umatilla and Morrow Counties
Hon. Janice Wilson, Senior Circuit Court Judge, Multnomah County
Hon. Merri Souther Wyatt, Senior Circuit Court Judge, Multnomah County