To: Chairperson Kropf and Members of the Committee.

From: W. Michael Gillette, retired Oregon Supreme Court Justice

Re: Support for SB 807A

Thank you for permitting me a few moments to offer what I hope will be useful comments on SB 807A. Let's start with a set of basic assumptions:

1. Everyone facing trial deserves to have his/her case heard before a fair and impartial judge. A party *always* has the right to remove a judge *for cause*. Anytime a lawyer can show a reasonable person would question a judge's impartiality in a case, the judge is disqualified. Oregon Judicial Code of Conduct, Rule 3.10.
2. Oregon judges strive to be fair and impartial. This does not mean that a judge does not dislike a lawyer or a party to a case; lawyers and parties appear before us from time to time who we personally dislike—sometime strongly. But a judge in such cases will try to, first, recognize such a feeling where it may exist and, second, consciously put the feeling aside in order to perform the judge's duties impartially. Of course, judges are human. But theirs is a profession in which they are required to set certain human reactions aside, in order to deliver justice in a form that will garner respect.
3. In Oregon, we elect our trial judges for six-year terms.
4. Elections are local. If there is a reason to believe that a candidate is likely to be universally unfair or biased in favor of someone, the local electorate is the body that we primarily rely on to weed out such people. (This is true when a judge stands for re-election, as well. A judge's biases are going to become known to the judge's local community, so that initial election is no guarantee that the judge will be reelected).

5. The foregoing notwithstanding, the Oregon legislature has provided an additional avenue for a lawyer or party to disqualify a judge from his or her case. That is the statutory scheme presently found in ORS 14.250 through 14.270.

ORS 14.260(1) allows lawyers and parties to disqualify a judge from a case based upon a good faith *belief* that the lawyer or party cannot have a fair or impartial trial or hearing before such judge. In 1992, in an opinion authored by me, the Oregon Supreme Court interpreted the extent to which a judge could successfully challenge a lawyer's or party's good faith belief under this statute and reject the motion to disqualify. *Kafoury ex rel. v. Jones*, 315 Or 201, 843 P2d 932 (1992). We concluded a judge could be successful only in "rare cases" when a party's sincere belief is "so irrational," that if the party prevailed it would be "tantamount to reinstating the 'peremptory challenge' scheme we condemned in *State ex rel. Bushman v. Vandenburg,* 203 Or 326, 280 P2d 344 (1955)[.]*" Id.* at 937.

> "We assume that the legislature did not intend to reinstate a statutory scheme that is, for all practical purposes, the twin of the one previously ruled unconstitutional by this court in the *Bushman* case." *Id.*

To this day, there are legitimate concerns that actual practice under ORS 14.260(1), as construed in *Kafoury*, has led to elected judges being blanket disqualified from criminal and juvenile dockets without regard for the facts of the case, the charges, the defendant, or the victim, if any. This is, in my view, a perversion of the purpose underlying ORS 14.260(1), and a disruption in the ability of the judicial branch to carry out its function of delivering fair and impartial justice to the citizens of this state. Sweeping, "blanket" motions in Oregon have disqualified duly elected judges from being available for extended periods of time (years and even decades in one district) preventing them from performing an important part of the work for which the judges were elected. *Kafoury*, at least, was a single case involving specific facts—exactly the kind of circumstance anticipated by the present statute. But turning the statute into a

"peremptory challenge" statute—essentially justifying a challenge on the ground that "I don't like the judge and/or the judge doesn't like me"—turns motions to disqualify into what amounts to removal from the bench. We usually leave that kind of drastic disqualification action to the electorate, not to lawyers continuously involved in a class of inherently contentious cases in which some judge must preside.

In my opinion, the narrowly drawn wording of A-engrossed SB 807 restores the balance in the judicial disqualification scheme that the Supreme Court all along considered to be the norm. Allowing the present practices to continue brings into question the power of the judiciary—a separate branch of government—to do its work. I urge you to send this Bill to the floor with a "Do Pass" recommendation.

Thank you for considering my remarks.

s/ W. Michael (Mick) Gillette
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