

THE JURY IS STILL OUT: SHOULD KANSAS CONTINUE TO ALLOW ITS CITIZENS TO INITIATE GRAND JURIES?

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I. INTRODUCTION

Kris Kobach, former Kansas Secretary of State, made headlines in 2018 when the Kansas Supreme Court ruled that a grand jury must investigate Kobach's office for allegedly mishandling voter registration information.¹ The court released its one-page opinion during the height of Kobach's gubernatorial campaign in Kansas,² and the decision was reported by news outlets across the country.³ Although the ruling was likely newsworthy due to Kobach's political status,⁴ many journalists highlighted that the grand jury investigating Kobach

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¹ See Peter Hancock, *Kansas Supreme Court Agrees Douglas County Must Summon Grand Jury to Investigate Kobach*, LAWRENCE J. WORLD (Aug. 31, 2018, 3:59 PM), <http://www2.ljworld.com/news/2018/aug/31/kansas-supreme-court-agrees-douglas-county-must-summon-grand-jury-to-investigate-kobach> [<https://perma.cc/LGE9-DDML>].

² See generally Bryan Lowry et al., *Kansas Race for Governor Poses a Complex Math Problem with Crowded Ballot*, KAN. CITY STAR (Aug. 19, 2018, 5:30 AM), <https://www.kansascity.com/news/politics-government/election/article216886830.html>.

³ See Associated Press, *Kansas Court Rules for Grand Jury Investigation of Kobach*, U.S. NEWS & WORLD REP. (Sept. 1, 2018, 7:10 PM), <https://www.usnews.com/news/best-states/kansas/articles/2018-09-01/kansas-high-court-upholds-kobach-citizen-grand-jury-ruling> [<https://perma.cc/QDK3-4DKY>]; Associated Press, *Kansas High Court Rules Grand Jury Must Be Convened to Investigate Kris Kobach*, L.A. TIMES (Sept. 1, 2018, 5:20 PM), <https://www.latimes.com/nation/la-na-kansas-kobach-20180901-story.html> [<https://perma.cc/ER82-P3G9>]; Jon Parton, *Path for Kobach Grand Jury Investigation Cleared*, COURTHOUSE NEWS SERV. (Aug. 31, 2018), <https://www.courthousenews.com/path-for-kobach-grand-jury-investigation-cleared> [<https://perma.cc/WX45-JKX7>].

⁴ Kris Kobach, the conservative, former Kansas Secretary of State, was endorsed by President Donald Trump during the Kansas 2018 gubernatorial election. Felicia Sonmez, *Trump Endorses Anti-Immigration Hard-liner Kris Kobach in Kansas GOP Primary*, WASH. POST (Aug. 6, 2018, 3:46 PM), https://www.washingtonpost.com/politics/trump-endorses-anti-immigration-hard-liner-kris-kobach-in-kansas-gop-primary/2018/08/06/6c64d14c-9960-11e8-b60b-1c897f17e185_story.html?utm_term=.7e694b97d86e [<https://perma.cc/9JDK-4NJJ>] (stating that Kobach is a "contro-

was initiated via a process that is relatively unique to Kansas: the citizen-initiated grand jury.⁵

Unlike the typical procedure where a court issues a summons to convene grand jurors, the grand jury that investigated Kobach was initiated by a petition from an individual named Steven Davis.⁶ Steven Davis is not a prosecutor, nor is he a judge.⁷ Steven Davis is a resident of Douglas County, Kansas who alleged that Kobach engaged in criminal activity when his office intentionally failed to process online voter registration.⁸ Davis contended that the actions of Kobach and his office prevented eligible Kansas residents from voting in the 2016 election.⁹ In an attempt to hold Kobach accountable, Davis utilized Kansas's citizen-initiated grand jury law.¹⁰

Kansas is one of only six states to allow citizens to initiate a grand jury.¹¹ Kansas's citizen-initiated grand jury law allows individuals to submit a petition to the court, and the court may then summon a grand jury to investigate the petitioner's allegations of suspected criminal wrongdoing.¹² The petition must meet the substantive requirements listed in the Kansas grand jury statute, and it must be accompanied by signatures from electors in the county.¹³ In Kansas, a petition for a grand jury must include signatures from 100 voters in the county where the court sits, plus two percent of the total number of votes cast in the county's last gubernatorial election.¹⁴ After the legitimacy of the signatures on the petition is verified, the judge, or judges, of the district court will determine if the petition complies with the statutory requirements.¹⁵ If the court determines that the petition is in proper form and bears the requisite number of signatures, the court will summon a grand jury.¹⁶

versial anti-illegal immigration hard-liner who previously served as the vice chairman of Trump's now-disbanded voting integrity commission.”).

⁵ See Hancock, *supra* note 1.

⁶ *In re Davis*, 423 P.3d 1044, 1047 (Kan. Ct. App. 2018).

⁷ Steven Davis was a Democratic candidate who unsuccessfully ran for the Kansas House of Representatives for District 44 in 2016. See *Steven Davis (Kansas)*, BALLOTEDIA, [https://ballotpedia.org/Steven_Davis_\(Kansas\)](https://ballotpedia.org/Steven_Davis_(Kansas)) [<https://perma.cc/ZW5Y-BCRB>] (illustrating that Davis also ran for the Kansas House of Representatives for District 45 in 2018, but he lost the primary).

⁸ See Bryan Lowry, *Kansas House Candidate Seeks Grand Jury Investigation into Kobach*, WICHITA EAGLE (July 27, 2016, 1:15 PM), <https://www.kansas.com/news/politics-government/election/article92136447.html>.

⁹ See *id.*

¹⁰ See generally Bryan Lowry & Steve Vockrodt, *Kobach Can Be Investigated by Citizen Grand Jury, Kansas Court of Appeals Rules*, KAN. CITY STAR (June 8, 2018), <https://www.kansascity.com/news/politics-government/article212811854.html>.

¹¹ See SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:2 (2d ed. 2018).

¹² See generally KAN. STAT. ANN. § 22-3001 (West 2017).

¹³ See *id.*

¹⁴ *Id.*

¹⁵ See *id.*

¹⁶ *Id.*

The Kansas citizen-initiated grand jury law has been well-established since the nineteenth century,¹⁷ but until recently, it was rarely invoked by citizens.¹⁸ Originally, the law was intended to serve as a check on public officials who evaded prosecution.¹⁹ Over the past decade, however, the law has operated as a channel for activist groups to attempt to further specific, political agendas through the judicial system.²⁰ Typically, these agendas have been anti-abortion and anti-pornography.²¹ Representatives from these activist groups have repeatedly addressed the Kansas Legislature in hopes of getting legislation enacted to modify the citizen-initiated grand jury law, which appears to be an effort to make it easier for these groups to move their agendas through the courts.²² Repeatedly, the Kansas Legislature has approved the activist groups' proposed amendments.²³

As the law currently stands, it is far too easy for groups and individuals to abuse the Kansas citizen-initiated grand jury law. The people of Kansas need to reclaim the citizen-initiated grand jury from the activist groups that have abused it because this process has the potential to do a great service to the public when properly wielded. If Kansans utilized the law as it was originally designed, the citizen-initiated grand jury could serve as a democratic means for citizens to hold public figures and organizations accountable for criminal activity that prosecutors are reluctant, or even refuse, to prosecute.²⁴ However, the manipulation of the citizen-initiated grand jury by activist groups in recent years has made it clear that, despite its great potential, the citizen-initiated grand jury law needs to be modified. The Kansas Legislature should enact limitations on the current Kansas citizen-initiated grand jury statute to ensure that activist groups do not continue to hijack the grand jury process to further their own political interests.

This article will analyze citizen-initiated grand juries in Kansas and propose modifications to the Kansas citizen-initiated grand jury law. Part II(a) discusses

¹⁷ See *In re Davis*, 423 P.3d 1044, 1047 (Kan. Ct. App. 2018).

¹⁸ See BEALE ET AL., *supra* note 11.

¹⁹ See generally Tim Anderson, *Capital Closeup: Three States in Midwest Allow for Citizen-Initiated Grand Juries*, COUNCIL OF ST. GOV'TS: TIM ANDERSON'S BLOG (Oct. 17, 2018, 3:24 PM), <https://knowledgecenter.csg.org/kc/content/capital-closeup-three-states-midwest-allow-citizen-initiated-grand-juries> [<https://perma.cc/KH9D-YKE5>].

²⁰ See *infra* text accompanying notes 124–58.

²¹ See Lorelei Laird, *Could a Kansas Grand Jury Really Indict a Sculpture?*, SLATE (Oct. 4, 2013, 11:59 AM), <https://slate.com/news-and-politics/2013/10/the-outrageous-effort-in-kansas-to-use-a-citizen-grand-jury-to-indict-a-sculpture.html> [<https://perma.cc/VK9Z-ZMXH>].

²² MINUTES OF H. JUDICIARY COMM., 83d Leg., Reg. Sess., (Kan. 2013) (reporting testimony from representatives of the American Family Association and Kansans for Life).

²³ See *infra* text accompanying notes 77–100.

²⁴ Prosecutors have discretion over the cases they choose to prosecute. If a prosecutor has a conflict of interest or, for whatever reason, does not want to press charges, then the prosecutor can opt to not press charges. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.2(a) (4th ed. 2018) (“The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.”).

the lack of scholarly literature published on the topic of citizen-initiated grand juries. Part II(b) provides a general history and overview of the grand jury system. Part II(c) offers background on citizen-initiated grand juries, while Part II(d) discusses citizen-initiated grand juries in Kansas. Part III evaluates criticisms of the Kansas citizen-initiated grand jury system. Finally, Part IV proposes several policy solutions to address the troubles plaguing the citizen-initiated grand jury in Kansas.

II. BACKGROUND

A. Literature Review

While many news articles have discussed the basic structure and function of the citizen-initiated grand jury,²⁵ there have been few, if any, scholarly articles published that analyze citizen-initiated grand juries in Kansas. It appears that the citizen-initiated grand jury is an area of law that has largely been ignored by legal scholars and researchers. However, several Kansas court opinions have recognized citizen-initiated grand juries.²⁶ In 2008, the Kansas Supreme Court upheld the constitutionality of the state's citizen-initiated grand jury statute.²⁷ Then in 2011, the Kansas Supreme Court held that a prosecutor exceeded his statutory authority when he attempted to guide a citizen-initiated grand jury to favor his own personal interests.²⁸ Kansas appellate courts had never examined the particulars of the citizen-initiated grand jury statute until June 2018 when the Kansas Court of Appeals issued an opinion regarding the subject-matter requirements for a citizen-initiated petition.²⁹

Aside from the few court opinions that have been published, there is an obvious lack of research and scholarly discussion surrounding citizen-initiated grand juries. This gaping hole in the literature needs to be remedied due to the fact that the residents of Kansas have invoked the citizen-initiated grand jury law much more frequently over the past decade.³⁰ In recent years, the Legislature has amended the law to make it easier for citizens to petition for grand juries in Kansas.³¹ However, it would be prudent for the Legislature to use caution before passing bills that broaden the powers of citizen-initiated grand juries. As there is currently little literature published analyzing the potential downfalls associated with the system, the Legislature would be wiser to treat citizen-initiated grand juries with trepidation. A full analysis of the benefits and drawbacks of the citizen-initiated grand jury is imperative to ensure that the system is not abused and, instead, utilized for its purpose and to its potential by

²⁵ See e.g., Associated Press, *Kansas Court Rules*, *supra* note 3 and accompanying text.

²⁶ See, e.g., *Dist. Court of Second Judicial Dist. v. McKenna*, 881 P.2d 1387 (N.M. 1994); *In re Ogden*, 286 P.2d 1088 (Okla. 1955); *State v. Chauncey*, 890 N.W.2d 453 (Neb. 2017).

²⁷ *Tiller v. Corrigan*, 182 P.3d 719, 724 (Kan. 2008).

²⁸ See *In re Kline*, 311 P.3d 321, 387 (Kan. 2013).

²⁹ *In re Davis*, 423 P.3d 1044, 1055 (Kan. Ct. App. 2018).

³⁰ See generally Anderson, *supra* note 19.

³¹ See *infra* notes 90, 184 and accompanying text.

the people of Kansas.

B. Introduction to Grand Juries

Citizen-initiated grand juries are an anomaly of the grand jury system. In order to fully understand the citizen-initiated grand jury, it is helpful to first understand the grand jury system in general.

America's modern grand jury system traces its roots back to England, where the grand jury operated as a tool of the Crown.³² The English colonists brought the concept of the grand jury to the colonies, and prior to the American Revolution, grand juries were frequently used.³³ In those times, grand juries were often used to hold public officials accountable for alleged acts of wrongdoing.³⁴ The Founding Fathers considered this function of the grand jury to be so significant that they incorporated it into the Fifth Amendment of the United States Constitution.³⁵ In the pertinent clause, the Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."³⁶ This amendment was included in hopes that it would protect individuals against unwarranted prosecution.³⁷

Grand juries are composed of ordinary citizens tasked with investigating individuals suspected of engaging in criminal activity.³⁸ The Fifth Amendment requires that all federal, criminal charges are brought by a grand jury indictment, but the states are free to decide how to utilize the grand jury system within each respective state.³⁹ Accordingly, some states have elected to abolish the use of grand juries entirely.⁴⁰ Instead, these states initiate criminal charges with a preliminary hearing to determine if probable cause exists.⁴¹

Grand jury proceedings may vary, but the basic order and structure of the grand jury remains consistent. Typically, there are between sixteen and twenty-three jurors on a grand jury.⁴² In a standard grand jury proceeding, the jurors are sworn in and given instructions from a judge.⁴³ Then, the prosecutor essentially takes over the proceedings and presents witnesses to the grand jurors for

³² See SUSAN W. BRENNER & LORI E. SHAW, *FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE* § 2:2 (2d ed. 2017).

³³ *Id.*

³⁴ See *In re Davis*, 423 P.3d at 1048.

³⁵ *Id.*

³⁶ U.S. CONST. amend. V.

³⁷ See BEALE ET AL., *supra* note 11, at § 2:3.

³⁸ See *id.* at § 1:7.

³⁹ See *In re Davis*, 423 P.3d at 1048–49.

⁴⁰ *Id.* at 1049.

⁴¹ *Id.*

⁴² See Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861–69 (2000 & Supp. IV 2004).

⁴³ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1180–85 (2008).

testimony.⁴⁴ Grand jury proceedings are shrouded in secrecy, and consequently, only the grand jurors, the prosecutor, a stenographer, interpreter (if needed), and the witness testifying are permitted to attend the proceedings.⁴⁵ The prosecutor is responsible for determining the order of the evidence, requesting that the court issue subpoenas, questioning the witnesses, and drafting the charges.⁴⁶ The prosecutor may also provide legal advice to the grand jurors.⁴⁷

After the grand jurors have received the totality of the prosecutor's evidence, they must determine whether or not to return a bill of indictment.⁴⁸ If the grand jurors find there is probable cause that the accused committed the crime, then the grand jurors are expected to return a vote for indictment.⁴⁹ However, if the grand jurors do not believe there is probable cause that the individual committed the crime, then the grand jury is expected to return a "no bill" vote, and the accused does not receive an indictment.⁵⁰

Grand jury proceedings are notoriously confidential, and this secrecy is one of the core elements of the United States' grand jury system.⁵¹ The federal grand jury system, and the majority of states, require grand jurors to conduct their proceedings without any representatives of the accused present.⁵² It is also standard to have serious restrictions placed on the extent to which the contents of grand jury proceedings may be disclosed to persons other than the grand jurors and court officers who participate in the proceedings.⁵³

A leading criticism of the grand jury is that prosecutors wield too much power over the proceedings.⁵⁴ Prosecutors are typically the sole source of evidence to the grand jurors, which is significant because the grand jurors rely on the evidence presented to them during the proceedings to determine whether to return an indictment.⁵⁵ Another criticism of the modern grand jury is the system's lack of transparency.⁵⁶ As discussed earlier, the grand jury is an establishment that is customarily shrouded in secrecy.⁵⁷ Defendants and defense attorneys often have no idea what takes place during the grand jury proceedings,

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, 130 HARV. L. REV. 1205, 1206–07 (2017).

⁵⁰ *Id.*

⁵¹ See generally Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1 (1996).

⁵² See BEALE ET AL., *supra* note 11, at § 5:1.

⁵³ *Id.*

⁵⁴ See *Restoring Legitimacy: The Grand Jury as the Prosecutor's Administrative Agency*, *supra* note 49, at 1208–09.

⁵⁵ *Id.* at 1208.

⁵⁶ See Roger A. Fairfax, *The Grand Jury's Role in the Prosecution of Unjustified Police Killings Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 415–16 (2017).

⁵⁷ See generally Kadish, *supra* note 51.

and in many jurisdictions, defendants are unable to access transcripts from the proceedings.⁵⁸ This lack of transparency has also been at the forefront of the public's distrust of the grand jury system after the failure of grand juries to indict police officers who shot and killed African-American civilians.⁵⁹ Critics contend that increased transparency is necessary to mend the public's distrust of the grand jury system and America's criminal justice system as a whole.⁶⁰

C. Citizen-Initiated Grand Juries

Essentially, grand juries and citizen-initiated grand juries are the same—except for one major difference: the manner by which the grand jury is summoned. A grand jury is typically summoned at a prosecutor's request, while a citizen-initiated grand jury is summoned at a citizen's request through a petition to the court.⁶¹ Only six states allow citizens to petition for a grand jury: Kansas, Nebraska, Nevada, New Mexico, North Dakota, and Oklahoma.⁶² Each of these states provide for citizens to petition either by statute or the state's constitution.⁶³

The requirements for a citizen-initiated grand jury vary by state, but each state requires inclusion of a specific number of signatures in the petition, as well as additional technical requirements that must be met for the court to determine whether a grand jury must be summoned.⁶⁴ Kansas has one of the lowest thresholds for meeting the requisite number of signatures in a citizen-initiated petition.⁶⁵ North Dakota and Nevada have the highest signature standards, requiring that petitions for a citizen-initiated grand jury be accompanied by signatures totaling at least twenty-five percent of the total votes cast in the county's last gubernatorial election.⁶⁶

⁵⁸ See BEALE ET AL., *supra* note 11, at § 9:1.

⁵⁹ See R. Michael Cassidy & Julian A. Cook, III, *The Grand Jury: A Shield of a Different Sort*, 51 GA. L. REV. 1001, 1002 (2017).

⁶⁰ *Id.*

⁶¹ See BEALE ET AL., *supra* note 11.

⁶² KAN. STAT. ANN. § 22-3001 (West 2017); NEB. REV. STAT. ANN. § 29-1401.02 (West 2002); NEV. REV. STAT. ANN. § 6.132 (West 2001); N.M. CONST. art. II, § 14; N.D. CENT. CODE § 29-10.1-02 (West 2013); OKLA. CONST. art. II, § 18.

⁶³ See BEALE ET AL., *supra* note 11 (stating that the citizen-initiated grand jury statutes do not have an equivalent in the federal judiciary because only a district court has the authority to summon a federal grand jury).

⁶⁴ *Id.*

⁶⁵ See KAN. STAT. ANN. § 22-3001(c)(1) (West 2018) ("A grand jury shall be summoned in any county within 60 days after a petition praying therefor is presented to the district court, bearing the signatures of a number of electors equal to 100 plus 2% of the total number of votes cast for governor in the county in the last preceding election.")

⁶⁶ See N.D. CENT. CODE ANN. § 29-10.1-02 (West 2002); NEV. REV. STAT. ANN. § 6.132 (West 2001).

D. Citizen-Initiated Grand Juries in Kansas

Citizen-initiated grand juries have received more attention in recent years, but the system is not a new phenomenon in Kansas. The law has been established in Kansas for over 100 years.⁶⁷ The Kansas legislature enacted the citizen-initiated grand jury statute in 1887, a time when the temperance movement was prevalent.⁶⁸ The law stated that individuals who hoped to initiate a grand jury were required to gather 200 signatures of “tax-payers of the county.”⁶⁹ It is thought that prohibitionists pushed for a citizen-initiated grand jury process in response to local officials’ failure to prosecute saloon owners in Kansas.⁷⁰

After the law was passed, it quickly had an impact on the distribution of alcohol in the state.⁷¹ One senator at the time noted, “[a]s soon as the first grand jury met, every whisky joint, about seventy-five in the county, and every drugstore selling without a license had disappeared.”⁷² In 1889, the Topeka Capital-Commonwealth reported on the purported success of the grand jury law since its adoption, writing that one senator “considered the grand jury one of the greatest safeguards of the law. The grand jury law of 1887 was passed for the purpose of enforcing the prohibitory law and it was effecting its object.”⁷³ Another senator was reported to have “defended the grand jury” because “[i]t had accomplished the destruction of liquor dealing and bootlegging . . .”⁷⁴ Alternatively, some senators were said to have opposed the citizen-initiated grand jury law, arguing that it was “a useless and expensive relic of the past.”⁷⁵ Yet, for the next century, very few changes were made to Kansas’s grand jury system.⁷⁶

However, in 2013, House Bill 2182 was proposed.⁷⁷ This bill addressed the subject-matter requirements for a citizen-initiated grand jury petition,⁷⁸ and it amended the Kansas statute to require the citizen who filed the citizen-initiated petition to testify as the first witness before the grand jurors.⁷⁹ Proponents of the bill contended that the changes were necessary because the grand jury process had been abused by prosecutors.⁸⁰ Kris Kobach, a staunch supporter of the bill,⁸¹

⁶⁷ *In re Davis*, 423 P.3d 1044, 1047 (Kan. Ct. App. 2018).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See Anderson, *supra* note 19.

⁷² *In re Davis*, 423 P.3d at 1050.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1051.

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ *In re Davis*, 423 P.3d at 1051.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*; Kobach delivered his testimony in support of House Bill 2182 several years prior to his own experience as an accused individual facing investigation by a citizen-initiated grand jury.

explained to the Legislature that the proposed bill “would help Kansas’s grand jury system remain consistent with its historical purpose.”⁸² Kobach explained that historically, the grand jury was intended to act as a defense mechanism against unwarranted prosecution and to be used as a tool against royal officials who were guilty of breaking the law.⁸³

Kobach also stated that the bill would make grand juries less reliant on a prosecutor because it would allow the jury to choose investigators or special counsel.⁸⁴ Additionally, Kobach asserted that calling the person who filed the grand jury petition as the first witness would prevent prosecutors “from steering the grand jury away from its intended purpose.”⁸⁵ Only one individual, a representative from the Kansas County and District Attorneys Association, provided testimony in opposition to the bill.⁸⁶ He stated that the bill could “allow special interest groups to micromanage and potentially politicize the grand jury process.”⁸⁷ Although his testimony was “prophetic,”⁸⁸ the bill was passed and its changes are still reflected in Kansas’s current grand jury statute.⁸⁹

In 2016, the Kansas grand jury statute was further amended to allow the person who filed the grand jury petition, and the person’s attorney, to witness the instructions given to the grand jury by the presiding judge.⁹⁰ The instructions would be delivered after the grand jury had been summoned but prior to any of the grand jury’s deliberations.⁹¹ Phillip Cosby, the State Director of the American Family Association, offered testimony in support of this bill.⁹² Cosby was part of an earlier attempt to bring a grand jury indictment to remove a sculpture depicting the female form in the Overland Park, Kansas Arboretum due to the sculpture’s alleged violation of obscenity laws.⁹³ Cosby testified before the Kansas Senate in 2016, arguing that the Legislature needed to allow the person who filed the grand jury petition to witness the jury instructions to ensure that the judge or prosecutor did not convey the instructions with a contemptuous, or otherwise interfering tone, to the grand jurors.⁹⁴ The Legislature ultimately enrolled the amendments into the Kansas grand jury

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *In re Davis*, 423 P.3d at 1051.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1052.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See KAN. STAT. ANN. § 22-3001 (West 2017).

⁹⁰ H.B. 2151, 85th Leg., Reg. Sess. (Kan. 2016).

⁹¹ *Id.*

⁹² PHILLIP COSBY, STATE DIRECTOR OF AMERICAN FAMILY ASSOCIATION OF KANSAS AND MISSOURI, TESTIMONY OF PHILLIP COSBY SUPPORTING H.B. 2151, 85th Leg., H.B. 2151, Reg. Sess. (Kan. 2016) (testifying before the Kansas Senate Judiciary Committee).

⁹³ Laird, *supra* note 21.

⁹⁴ PHILLIP COSBY, STATE DIRECTOR OF AMERICAN FAMILY ASSOCIATION OF KANSAS AND MISSOURI, TESTIMONY OF PHILLIP COSBY SUPPORTING H.B. 2151, 85th Leg., H.B. 2151, Reg. Sess. (Kan. 2016).

statute.⁹⁵

In 2017, the Kansas Legislature proposed a bill that would grant immunity from civil liability to an individual who filed a citizen-initiated petition.⁹⁶ Then, in January 2019, Phillip Cosby once again delivered testimony before the Kansas Senate Judiciary Committee regarding amendments to the citizen-initiated grand jury law.⁹⁷ This time, Cosby requested that the Legislature prohibit diversion agreements after true bills of indictment have been returned by citizen-initiated grand juries.⁹⁸ Cosby stated that such an amendment was necessary because individuals and groups who are indicted by citizen-initiated grand juries for violating obscenity laws typically only receive diversion as punishment.⁹⁹ Cosby's attempt at amending the citizen-initiated grand jury law did not succeed, however, Cosby ended his testimony by pointing out that the Kansas Legislature has "enacted about a dozen statutory remedies in as many years" regarding citizen-initiated grand juries.¹⁰⁰

Appellate Kansas courts have also recently been involved in citizen-initiated grand juries. In June 2018, the Kansas Court of Appeals issued an opinion regarding the subject-matter requirements for a citizen-initiated grand jury petition.¹⁰¹ The Court's opinion stemmed from the Douglas County District Court's dismissal of Steven Davis's petition to have a grand jury investigate former Secretary of State Kris Kobach.¹⁰²

Steven Davis submitted his citizen-initiated petition to the court in August 2017.¹⁰³ The petition stated:

The grand jury shall investigate Kansas Secretary of State Kris Kobach and any of his subordinates, employees, and other affiliated persons carrying out duties related to the management of voter registration data for allegedly:

1. Destroying, obstructing, or failing to deliver online voter registration applications in violation of K.S.A. 25-2421a,
2. Possessing falsely made or altered registration books in violation of K.S.A. 25-2420,

⁹⁵ See KAN. STAT. ANN. § 22-3001 (West 2017).

⁹⁶ S.B. 290, 87th Leg., Reg. Sess. (Kan. 2018) (stating that the bill died in committee on May 4, 2018).

⁹⁷ PHILLIP COSBY, STATE DIRECTOR OF AMERICAN FAMILY ASSOCIATION OF KANSAS AND MISSOURI, NEUTRAL TESTIMONY OF PHILLIP COSBY, S.B. 18, 88th Leg., Reg. Sess. (Kan. 2019).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See generally *In re Davis*, 423 P.3d 1044, 1047 (Kan. Ct. App. 2018).

¹⁰² *Id.* at 1047.

¹⁰³ *Id.*

3. Preventing qualified electors from voting in violation of K.S.A. 25-2419, and

4. Being grossly neglectful with respect to their election duties in violation of K.S.A. 24-2419.

‘The grand jury may further inquire into other alleged violations of law, by these or other individuals, which arise as part of the same investigation.’¹⁰⁴

Davis’s petition garnered enough signatures to fulfill the statutory requirement.¹⁰⁵ Nevertheless, the Douglas County District Court dismissed Davis’s petition based on the determination that the petition did not meet the form requirements listed in the Kansas grand jury statute.¹⁰⁶ Specifically, the court found that “the petition contained no allegations of specific facts that would warrant a finding that the inquiry might lead to information which, if true, would warrant a true bill of indictment.”¹⁰⁷ Davis appealed the Douglas County District Court’s decision,¹⁰⁸ and the Kansas Court of Appeals reversed, finding that Davis’s petition contained sufficient general allegations as required by the statute.¹⁰⁹

The Kansas Court of Appeals reached its determination through a process of statutory interpretation and analysis of the legislative history of Kansas’s citizen-initiated grand jury law.¹¹⁰ The court held that it is clear the language of the citizen-initiated grand jury statute does not require the person filing the petition to include all of the relevant facts in the petition.¹¹¹ Further, the court stated that if this was required, it “would severely limit the purpose of a citizen-initiated grand jury” because citizens may not have access to that kind of information.¹¹² In light of this analysis, Davis’s petition was deemed sufficient, and the court remanded the case to the Douglas County District Court.¹¹³

Kobach requested a review of the Kansas Court of Appeals’ decision, but in a one-page order, the Kansas Supreme Court denied his request.¹¹⁴ The court

¹⁰⁴ *Id.* at 1047–48.

¹⁰⁵ *Id.* at 1048. Pursuant to KAN. STAT. ANN. § 22-3001, Davis was required to gather signatures from eight hundred and sixty individuals in Douglas County. Davis collected nine hundred and ten signatures. See Lowry & Vockrodt, *supra* note 10.

¹⁰⁶ See *In re Davis*, 423 P.3d at 1048.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1060.

¹¹⁰ See generally *id.* at 1047–61.

¹¹¹ See *id.* at 1058.

¹¹² *In re Davis*, 423 P.3d at 1058.

¹¹³ *Id.* at 1060.

¹¹⁴ Hancock, *supra* note 1.

offered no further explanation for its decision.¹¹⁵ Kobach appealed the ruling, and once again, the Kansas Supreme Court denied his request.¹¹⁶ As ordered by the courts, a grand jury would have to investigate Kobach for the allegations made against him in Davis's petition. Kobach denied the allegations, calling the statements in Davis's petition "patently false."¹¹⁷ According to Kobach's office, the allegations refer to a "brief period in 2016 when online registration systems were malfunctioning," and that election officials quickly ensured the affected residents were able to cast their votes.¹¹⁸

The citizen-initiated grand jury's investigation of Kobach began in January 2019,¹¹⁹ and the grand jury did not adjourn until March 2019 when it returned with a bill of no indictment.¹²⁰ The grand jurors had reviewed the evidence presented to them, which included the citizen petition, exhibits, and testimony of witnesses.¹²¹ The grand jury concluded that Kris Kobach had committed "no cognizable crime under the laws of the State of Kansas."¹²² Steven Davis, who had petitioned for the citizen-initiated grand jury, indicated "that he was disappointed in the outcome but that he respected the process."¹²³

III. CRITICISMS OF CITIZEN-INITIATED GRAND JURIES

The citizen-initiated grand jury has the potential to operate as a channel for citizens to hold public officials accountable for criminal activity, but the system is not without its pitfalls. One of the leading criticisms of the citizen-initiated grand jury is that it empowers biased activist groups to politicize the judicial process.¹²⁴ The judiciary was designed to be an independent, non-political branch of government that does not respond to popular whims but rather responds to the rule of law.¹²⁵ This is evidenced by lifetime judicial

¹¹⁵ *Id.*

¹¹⁶ See Associated Press, *Kansas Supreme Court Clears Way for Grand Jury Probe of Kris Kobach*, TOPEKA CAP. J. (Nov. 21, 2018, 6:02PM), <https://www.cjonline.com/news/20181121/kansas-supreme-court-clears-way-for-grand-jury-probe-of-kris-kobach> [https://perma.cc/9GNT-W798].

¹¹⁷ See Associated Press, *Douglas County Grand Jury on Kobach to Start Next Week*, WICHITA KAN. NEWS & WEATHER (Jan. 14, 2019, 2:07 PM), <http://www.kten.com/story/39787317/douglas-county-grand-jury-on-kobach-to-start-next-week> [https://perma.cc/MC2W-UK2R].

¹¹⁸ *Id.*

¹¹⁹ See Sara Shepherd, *Kobach Grand Jury Process to Begin Next Week in Douglas County*, LAWRENCE J. WORLD (Jan. 14, 2019, 11:29 AM), <http://www2.ljworld.com/news/state-government/2019/jan/14/kobach-grand-jury-process-to-begin-next-week-in-douglas-county> [https://perma.cc/SR3S-EAN2].

¹²⁰ Sara Shepherd, *Citizen Grand Jury Disbands in Kobach Case Without Returning Indictment*, LAWRENCE J. WORLD (Mar. 6, 2019, 4:23 PM), <https://www2.ljworld.com/news/public-safety/2019/mar/06/citizen-grand-jury-disbands-in-kobach-case-without-returning-indictment> [https://perma.cc/PA9F-J76B].

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See ALM MEDIA PROPERTIES, LLC., GRAND JURY PRACTICE § 3.01 (2019).

¹²⁵ See Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the*

appointments, judicial immunity, and the enumerated separation of powers in the Constitution.¹²⁶ Allowing citizen-initiated grand juries injects politics into the judicial system by permitting citizens to commandeer the system. Citizen-initiated grand juries should not be used as a workaround of the legislature. This politicization has particularly been a problem in the state of Kansas.¹²⁷ In recent years, special interest groups in Kansas have utilized the citizen-initiated grand jury more frequently than any other state.¹²⁸

The heightened use of Kansas's citizen-initiated grand jury law appears to have commenced with conservative groups targeting abortion clinics and adult bookstores.¹²⁹ In 2006, citizens petitioned for a grand jury to investigate Dr. George Tiller's abortion clinic in Wichita, Kansas amid allegations that Dr. Tiller was performing late term abortions.¹³⁰ The grand jury did not return an indictment.¹³¹ Anti-abortion activists continued their crusade with citizen-initiated grand juries in 2007 when a group of individuals in Johnson County, Kansas petitioned for a grand jury to investigate Planned Parenthood.¹³² Dr. Tiller's attorney, Lee Thompson, stated that the citizen-initiated grand jury process had "virtually become active vigilantism" and that he believed the law allowed a small minority of individuals with a particular agenda to force a criminal investigation.¹³³ Thompson argued that this usurps the government's executive power.¹³⁴

Yet another citizen-initiated grand jury was convened in 2008 to investigate Dr. Tiller and other individuals performing professional services at the Women's Health Care Services, Inc. (WHCS), in Wichita, Kansas.¹³⁵ The grand jurors issued subpoenas *duces tecum* for the medical records of every woman at least twenty-two weeks pregnant who had received, or tried to receive, an abortion from Dr. Tiller's clinic in the past five years.¹³⁶ Tiller and WHCS moved to quash the subpoenas on grounds that reviewing more than 2,000 patient records was an undue burden, and that it also imposed "an unjustified and profound intrusion on all similarly situated patients' privacy rights."¹³⁷ Additionally,

First Amendment, and Judges and Politicians, 21 YALE L. & POL'Y REV. 301, 306 (2003).

¹²⁶ See U.S. CONST. art. III, § 1.

¹²⁷ See generally Tim Anderson, *supra* note 19.

¹²⁸ *Id.*

¹²⁹ See Associated Press, *Headlines for Wednesday, January 20, 2016*, KAN. P. RADIO (Jan. 20, 2016), <https://kansaspublicradio.org/kpr-news/headlines-wednesday-january-20-2016> [<https://perma.cc/STQ6-6PAB>].

¹³⁰ See Associated Press, *Abortion Foes Use 19th-Century Law for Help*, NBC NEWS (Jan. 17, 2008, 6:05 PM), http://www.nbcnews.com/id/22715924/ns/us_news-crime_and_courts/t/abortion-foes-use-th-century-law-help/#.W93p6KeZPfZ [<https://perma.cc/2TUU-SCPN>].

¹³¹ *Id.*

¹³² See Lowry & Vockrodt, *supra* note 10.

¹³³ See Associated Press, *Abortion Foes Use 19th-Century Law*, *supra* note 130.

¹³⁴ *Id.*

¹³⁵ See *Tiller v. Corrigan*, 182 P.3d 719, 721 (Kan. 2008).

¹³⁶ *Id.*

¹³⁷ *Id.* at 723.

Tiller and WHCS questioned the constitutionality of the citizen-initiated grand jury, arguing that it is a violation of the separation of powers doctrine to allow citizens to petition for a grand jury to investigate criminal activity.¹³⁸ Tiller and WHCS contended that investigating crime is an executive function, and grand jury investigations fall within the judicial branch.¹³⁹ Thus, the legislature's approval of citizen-initiated grand juries is an invasion of the other two branches of government.¹⁴⁰

The Kansas Supreme Court rejected this argument, holding that the citizen-initiated grand jury statute is not unconstitutional.¹⁴¹ However, the court found that judges who oversee state grand juries must ensure that the grand jury does not overstep its bounds as an investigatory body for the judiciary.¹⁴² In other words, the court should determine that the grand jury "has not engaged in an arbitrary fishing expedition" and the targets of the citizen-initiated petition are not chosen out of malice, or with the intent to harass.¹⁴³ Ultimately, the grand jurors did not return an indictment against Dr. Tiller or WHCS.¹⁴⁴

Activists have also used the citizen-initiated grand jury to target alleged violations of obscenity laws in Kansas.¹⁴⁵ Since 2005, there have been numerous investigations of adult bookstores in Kansas by way of citizen-initiated grand jury petitions.¹⁴⁶ Most notably, in 2012, the American Family Association¹⁴⁷ filed a citizens' petition in Johnson County to have a grand jury investigate a sculpture.¹⁴⁸ The bronze sculpture was located in the Overland Park Arboretum, and it depicted a headless, bare-chested woman holding a camera and taking a picture of herself.¹⁴⁹ The artist, Yu Chang, likely intended the sculpture to operate as a criticism¹⁵⁰ of "sexting."¹⁵¹ However, the American Family

¹³⁸ *Id.* at 724.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Ron Sylvester, *Court Limits Citizen-Petitioned Grand Juries*, WICHITA EAGLE (May 7, 2008), <http://archive.li/HDNbD> [<https://perma.cc/9BYL-3KJB>].

¹⁴³ *Tiller*, 182 P.3d at 729.

¹⁴⁴ See Ron Sylvester, *Kansas Grand Jury Law Comes Under Fire*, WICHITA EAGLE (May 7, 2008), <https://monnat.com/kansas-grand-jury-law-comes-under-fire/> [<https://perma.cc/R5QJ-KYBR>].

¹⁴⁵ See Roxana Hegeman, *Kansas Lawmakers Eye Change to Citizen-Petitioned Grand Jury*, TOPEKA CAPITAL-J. (Jan. 15, 2016, 3:55 PM), <https://www.cjonline.com/news/2016-01-15/kansas-lawmakers-eye-change-citizen-petitioned-grand-jury> [<https://perma.cc/47EX-FMJ9>].

¹⁴⁶ See *id.*

¹⁴⁷ See generally *Our Mission*, AMERICAN FAM. ASS'N, <https://www.afa.net/who-we-are/our-mission> [<https://perma.cc/LQ3N-HUNR>] (illustrating that the American Family Association is a conservative, non-profit organization that promotes fundamentalist Christian values).

¹⁴⁸ See Laird, *supra* note 21.

¹⁴⁹ *Id.*

¹⁵⁰ Sexting is defined as "the sending of sexually explicit messages or images by cell phone." *Sexting*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sexting> [<https://perma.cc/EVR9-ZPTV>].

¹⁵¹ Laird, *supra* note 21.

Association alleged that the sculpture was obscene.¹⁵²

The American Family Association acquired the requisite signatures for its petition, convening a grand jury to investigate the sculpture.¹⁵³ The grand jury sat for one day and examined the state's obscenity laws and pictures of the sculpture.¹⁵⁴ After deliberating, the grand jury returned a bill of no indictment, finding that the sculpture was art and, consequently, not in violation of Kansas's obscenity law.¹⁵⁵ Still, the American Family Association's citizen-initiated grand jury endeavor was costly for Overland Park; the city had to pay \$35,000 to defend the right to exhibit the sculpture.¹⁵⁶

The Kansas Court of Appeals also recently identified potential risks associated with allowing citizens to initiate grand juries.¹⁵⁷ In the conclusion of the Kansas Court of Appeals' June 2018 opinion regarding the subject-matter requirements of the citizen-initiated grand jury statute, Chief Justice Arnold-Burger stated:

In issuing our decision today, we are mindful that the mere calling of a grand jury directed at the actions of a public official or a private individual without probable cause to believe a crime has been committed and without the guiding hand of a professional prosecutor can have serious personal and professional consequences. But the Kansas Legislature has determined that it wants to provide for citizen-initiated grand juries and it wants them to have broad powers to investigate possible criminal activity. The wisdom of this law is not a concern of our court.¹⁵⁸

Although the Chief Justice did not condemn the citizen-initiated grand jury, it is apparent that the court harbors reservations towards the citizen-initiated grand jury law in Kansas.

Providing citizens with an outlet to hold public officials accountable for their alleged crimes may be a noble idea, but the beneficial aspects are tainted when special interest groups abuse the citizen-initiated grand jury system. Grand juries are costly, and if activist groups continuously petition for grand juries to investigate allegations that ultimately have little merit, it wastes tax-payer dollars.¹⁵⁹ Additionally, summoning grand juries to investigate frivolous or

¹⁵² *Id.*

¹⁵³ See Mary Bata, *Citizens of Johnson County v. Two Bare Breasts*, ACLU KAN. (Sept. 24, 2013, 10:00 AM), <https://www.aclukansas.org/en/news/johnson-county-v-two-bare-breasts> [<https://perma.cc/4W7T-XEEU>].

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *In re Davis*, 423 P.3d 1044, 1047 (Kan. Ct. App. 2018).

¹⁵⁸ *Id.*

¹⁵⁹ The court systems are funded by taxpayers, and grand juries require court services. It follows that some taxpayer money is used to fund grand juries. See *id.* at 1050–51.

politically charged claims will clog up the courts and waste the judiciary's resources. Citizen-initiated grand juries may consist of only a small group of disgruntled people, but their efforts can cost the state thousands of dollars and hamper judicial efficiency.¹⁶⁰

The citizen-initiated grand jury is a tool that should only be utilized for serious instances of criminal misconduct the government has failed to prosecute. When special interest groups take over the citizen-initiated grand jury process to further their own specific agendas, it calls into question whether the citizen-initiated grand jury is fulfilling its purpose as the Kansas Legislature intended, or if the law governing the process needs to be changed.

IV. POLICY SUGGESTION

The Kansas Legislature has made it clear that it wants to provide citizens with the means to utilize the grand jury system by way of citizen-initiated grand juries.¹⁶¹ The process allows ordinary people to attempt to obtain justice when they feel as though the judicial system has failed to prosecute someone who should be criminally charged. This is valuable in situations where public officials are allegedly engaging in criminal activity but, because of their positions of power, may escape accountability if the courts are reluctant to prosecute them. If appropriately utilized by the people, the citizen-initiated grand jury allows ordinary people to hold public officials accountable for their actions.

Nevertheless, the citizen-initiated grand jury has its drawbacks. In recent years, special interest groups have abused Kansas's citizen-initiated grand jury law by using the process to further their own interests. The abuse calls into question whether Kansas should continue to allow its citizens to initiate grand juries. Critics may even argue that Kansas should completely abolish its citizen-initiated grand jury law. However, until further research is conducted on the issue, Kansas should not abolish the citizen-initiated grand jury. The statute serves as a judicial tool for citizens to utilize when they feel they have been wronged and when they feel prosecutors have unjustly ignored illegal conduct. The citizen-initiated grand jury gives Kansans the power to stand up for themselves. Instead of abolishing citizen-initiated grand jury law, the Legislature should apply certain modifications to the existing grand jury statute to protect the courts from those who might abuse the system. Modifications to the citizen-initiated grand jury law, as opposed to abolishment, would allow Kansans to retain the option of the citizen-initiated grand jury as an outlet to hold public officials and organizations accountable for their actions.

In comparison to other states, Kansas arguably has the most permissive

¹⁶⁰ Cf. Bata, *supra* note 153 (stating that the efforts of the American Family Association to indict the sculpture in Overland Park cost the city of Johnson County \$35,000).

¹⁶¹ See generally *In re Davis*, 423 P.3d at 1044.

laws regarding the requirements for a citizens' petition, as well as the amount of control the petitioner wields over the grand jury's proceedings. While many states have chosen to diminish the power of the grand jury, Kansas has elected to increase the independence of the grand jury through its citizen-initiated grand jury law.¹⁶² Not only does Kansas have one of the lowest signature requirements for a citizen-initiated petition,¹⁶³ but the Kansas Legislature has also taken efforts to pass bills that give ordinary citizens additional influence over grand jury proceedings.¹⁶⁴ Further, in recent years, Kansas has had significantly more instances of special interest groups attempting to use the citizen-initiated grand jury process than any other state.¹⁶⁵ While correlation does not necessarily equal causation, it is worth noting that the state with one of the lowest thresholds for citizens to petition for a grand jury is also the state that has had its process most frequently abused.

A. The Kansas Legislature Should Increase the Signature Requirements for Citizen-Initiated Grand Jury Petitions

Kansas should retain the citizen-initiated grand jury, but to combat the misuse currently troubling the system, the Legislature should increase the number of signatures required for a citizen-initiated petition. As the law currently stands, it is far too easy for special interest groups to obtain the mandated number of signatures for a citizens' petition. By increasing the signature requirement, those who attempt to bring frivolous claims will likely have a harder time acquiring the number of signatures needed to meet the requirements for a petition.

Moreover, increasing the signature requirement should not have a negative impact on citizens who have legitimate claims. Citizens are prompted to file a citizens' petition when prosecutors fail to investigate egregious criminal activity.¹⁶⁶ It follows that criminal activity of such a level would evoke similar outrage among other citizens. Thus, an individual should have little difficulty acquiring enough signatures to meet the statutory requirement in instances where there is such an obvious need for a grand jury to investigate the alleged criminal activity.

Currently, the Kansas grand jury statute requires a citizen-initiated petition to have signatures of one hundred electors, plus two percent of the number of votes cast in the county's last gubernatorial election.¹⁶⁷ This is a low threshold to meet, and in Kansas counties with particularly low populations, it is easier for special interest groups to take advantage of the system because they only need

¹⁶² *Id.* at 1051.

¹⁶³ See generally Anderson, *supra* note 19.

¹⁶⁴ See *In re Davis*, 423 P.3d at 1051–54.

¹⁶⁵ See generally Anderson, *supra* note 19.

¹⁶⁶ See BEALE ET AL., *supra* note 11.

¹⁶⁷ KAN. STAT. ANN. § 22-3001 (West 2017).

to gather a small number of signatures to meet the statutory requirement. For example, in Hamilton County, Kansas, 630 votes were cast in the 2018 gubernatorial election.¹⁶⁸ Two percent of the total number of votes cast in Hamilton County rounds up to equal thirteen. Thirteen, plus the signatures of 100 electors, would mean that an individual hoping to have a viable citizens' petition in Hamilton County, Kansas would only need to obtain signatures from 113 people. In comparison, an individual seeking a citizen-initiated grand jury in Johnson County, Kansas would need to acquire well over 6,000 signatures.¹⁶⁹ Although larger counties like Johnson County, Kansas have higher signature requirements, smaller counties in Kansas could easily be abused by special interest groups seeking to initiate a grand jury due to the low signature requirements.

The majority of states with citizen-initiated grand jury laws require a citizen-initiated petition to be accompanied by signatures ranging from ten to twenty-five percent of the votes cast in the last gubernatorial election.¹⁷⁰ Only New Mexico's grand jury statute rivals the low signature requirement for a citizens' petition in Kansas. In New Mexico, a citizens' petition must be signed by no less "than the greater of two hundred registered voters or two percent of the registered voters of the county . . ."¹⁷¹ Accordingly, New Mexico is also Kansas's primary rival for instances of citizen-initiated grand juries attempting to politicize the judicial process.¹⁷² Kansas should mirror the signature requirements of other states by amending the grand jury statute for a citizens' petition to require signatures of at least ten percent of the votes cast in the county's last gubernatorial election. Further, the Legislature should even consider requiring signatures from twenty-five percent of votes cast in the county's last gubernatorial election in accordance with the grand jury laws in North Dakota¹⁷³ and Nevada.¹⁷⁴

The citizens' petition signature requirement in North Dakota was not always twenty-five percent of the voters in the county's last gubernatorial election.¹⁷⁵ In 2013, the North Dakota citizen-initiated grand jury law underwent an amendment process where the North Dakota Legislature increased the signature requirements for a citizen-initiated petition.¹⁷⁶ Previously, the law

¹⁶⁸ POLITICO, *Kansas Election Results 2018*, <https://www.politico.com/election-results/2018/kansas> (last updated Sept. 29, 2019, 12:50 AM) [perma.cc/X9VM-7UYU].

¹⁶⁹ *See id.*

¹⁷⁰ *See* NEB. REV. STAT. ANN. § 29-1401(3) (West 2016); NEV. REV. STAT. ANN. § 6.132(2)(a) (West 2001); N.D. CENT. CODE ANN. § 29-10.1-02 (West 2013).

¹⁷¹ N.M. CONST. art. II, § 14.

¹⁷² *See generally* BEALE ET AL., *supra* note 11.

¹⁷³ N.D. CENT. CODE ANN. § 29-10.1-02 (West 2013).

¹⁷⁴ NEV. REV. STAT. ANN. § 6.132 (West 2001).

¹⁷⁵ *See Bill Seeks to Raise Bar for Citizen Grand Jury Petitions*, GRAND FORKS HERALD (Feb. 3, 2013, 5:00 AM), <https://www.grandforksherald.com/content/bill-seeks-raise-bar-citizen-grand-jury-petitions-1> [https://perma.cc/5S5F-3MPR].

¹⁷⁶ *See id.*

required a citizens' petition to include signatures from ten percent of voters in the county's last election.¹⁷⁷ The amended law demands signatures of twenty-five percent of voters in the county's last election.¹⁷⁸ The amended law further requires that the number of signatures may not be fewer than 225 and may not exceed 5,000.¹⁷⁹

The North Dakota bill was proposed shortly after residents of Dunn County petitioned to investigate the governor.¹⁸⁰ North Dakota Representative Jim Kasper, a prime sponsor of the bill, said that, although he did not want to eliminate the citizens' ability to convene a grand jury, he thought that the bar should be raised by increasing the number of required signatures.¹⁸¹ Kasper said that he was concerned about "abuse of the grand jury function based upon ideology, political agenda and many, many other aspects of what people's viewpoints are."¹⁸² The proposed bill faced some backlash from critics who believed it was an attempt to make it more challenging for public officials to be investigated by citizen-initiated grand juries.¹⁸³ However, the bill was eventually passed and, since then, citizen-initiated grand juries in North Dakota have rarely been invoked.¹⁸⁴

Increasing the number of signatures required for a citizens' petition likely will not completely prevent special interest groups from ever obtaining a citizen-initiated grand jury in Kansas, but at least it is a starting point that will raise the bar for citizen-initiated petitions. As seen in North Dakota, raising the signature requirement could have the effect of deterring individuals from using citizen-initiated grand juries for unmeritorious claims, politically motivated claims, or both. If special interest groups have the money and resources to advertise for their petition, then the signature requirements may not hinder them from obtaining a citizen-initiated grand jury. However, as the Kansas signature requirements currently stand, it is far too simple for activist groups to utilize the citizen-initiated grand jury process for their own interests. Altering the signature requirement may not completely dissuade groups and individuals from abusing the citizen-initiated grand jury, but it is an initial step towards addressing some of the problems currently afflicting the system in Kansas.

¹⁷⁷ *Id.*

¹⁷⁸ See N.D. CENT. CODE ANN. § 29-10.1-02 (West 2013).

¹⁷⁹ *Id.*

¹⁸⁰ See GRAND FORKS HERALD, *supra* note 173.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *id.*

¹⁸⁴ Extensive research indicates that the most recent news coverage surrounding citizen-initiated grand juries in North Dakota dates to 2013. This implies that citizen-initiated grand juries have rarely, if ever, been summoned in North Dakota since that time.

B. The Kansas Legislature Should Repeal Senate Substitute for House Bill 2182

To further combat the pitfalls of the citizen-initiated grand jury, the Kansas Legislature should remove the language in the grand jury statute that requires the person filing the petition to be called as the first witness in front of the grand jurors. The language of the statute is found in section 22-3001(c)(4)(B) of the Kansas Statutes Annotated, stating that “the person filing the citizens’ petition filed in this court must be the first witness you call for the purpose of presenting evidence and testimony as to the subject matter and allegations of the petition.”¹⁸⁵ This was added to the statute in 2013 through Senate Substitute for House Bill 2182 (“H.B. 2182”).¹⁸⁶

The Legislature should repeal H.B. 2182 because it allows individuals to easily use the grand jury system for their own political interests. The amended language in the Kansas grand jury statute impedes the grand jury’s prerogative in scheduling testimony from witnesses because the statute *requires* the person who filed the citizens’ petition to be the first witness.¹⁸⁷ This is troublesome because once the person who filed the citizens’ petition is called to testify in front of the grand jurors, that person then has a platform which they could use to exert their influence over the grand jurors. The current statute gives the person who filed the citizens’ petition an opportunity to steer the grand jury away from the direction the prosecutor, a legally trained professional with ethical obligations, had planned for the grand jury proceedings.

No other states have adopted legislation similar to H.B. 2182, and no federal grand juries utilize a similar process.¹⁸⁸ Kansas is the only state that requires the person who filed the citizens’ petition to be called as the first witness before the grand jury.¹⁸⁹ Proponents of H.B. 2182 were primarily individuals from special interest organizations, some of which were the organizations that have utilized the citizen-initiated grand jury process for their own political interests in the past.¹⁹⁰

The sole testimony in opposition of the bill was from an individual from the Kansas County and District Attorneys Association.¹⁹¹ He testified that the bill was proposed “. . . perhaps based on the anecdotal experience of a grand jury petitioner who was dissatisfied with the decision that an indictment was not a true bill.”¹⁹² Indeed, one proponent of H.B. 2182 testified about his experience as a juror in a citizen-initiated grand jury, and another supporter of the bill

¹⁸⁵ KAN. STAT. ANN. § 22-3001(c)(4)(B) (West 2017).

¹⁸⁶ H.B. 2182, 83d Leg., Reg. Sess. (Kan. 2013).

¹⁸⁷ See KAN. STAT. ANN. § 22-3001(c)(4)(B) (West 2017).

¹⁸⁸ See generally BEALE ET AL., *supra* note 11, at § 6:1–6:9.

¹⁸⁹ MINUTES OF H. JUDICIARY COMM., 83d Leg., Reg. Sess. (Kan. 2013).

¹⁹⁰ See *id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

testified about cases he had heard of where a grand jury did not return a bill of indictment, which he believed was unjust.¹⁹³ It appears as though special interest organizations were the ones who brought H.B. 2182 to fruition, and the same special interest groups are the ones who have abused the citizen-initiated grand jury process in the past.¹⁹⁴ Consequently, the Kansas Legislature should repeal H.B. 2182 because requiring the person who filed the citizens' petition to be the first witness before the grand jurors enables special interest groups to misuse the citizen-initiated grand jury process. The Legislature should remove the language in section 22-3001(c)(4)(B) of the Kansas Statutes Annotated, thereby reverting the citizen-initiated grand jury process to allow the courts to determine who will be called as the first witness before the grand jurors.

C. Scholars Need to Conduct Further Research on Citizen-Initiated Grand Juries

The lack of scholarly research and literature analyzing this topic makes it difficult to advise further modifications to the Kansas grand jury statute. Without first fully understanding the citizen-initiated grand jury process and its problems, the Legislature will be unable to adequately remedy the failing aspects of the system. In recent years, the Kansas Legislature passed legislation that expanded the power and scope of the citizen-initiated grand jury in Kansas. However, due to the lack of literature surrounding the topic, it is apparent that the primary driving force behind enactment of the recent citizen-initiated grand jury amendments was testimony provided by individuals from special interest groups.¹⁹⁵ Therefore, it is imperative that researchers and scholars take the initiative to research citizen-initiated grand juries, so the Legislature can rely on accurate research when presented with future proposals to amend the Kansas citizen-initiated grand jury law.¹⁹⁶

V. CONCLUSION

Citizen-initiated grand juries have the potential to be of great service to the people of Kansas. The citizen-initiated grand jury allows ordinary citizens to hold public officials responsible for their actions. When prosecutors fail to investigate officials for alleged criminal activity, the citizen-initiated grand jury is a unique tool that could be utilized by Kansans to keep these officials in check. However, Kansas's citizen-initiated grand jury laws need reform. The Kansas Legislature should increase the signature requirements for a citizen-initiated petition to deter special interest groups from utilizing the system to further their

¹⁹³ *Id.*

¹⁹⁴ *Id.* The American Family Association and Kansans for Life testified in support of H.B. 2182. Both groups were involved in past efforts to obtain citizen-initiated grand juries in Kansas.

¹⁹⁵ MINUTES OF H. JUDICIARY COMM., 83d Leg., Reg. Sess. (Kan. 2013) (reporting testimony from representatives of the American Family Association and Kansans for Life).

¹⁹⁶ Further research on citizen-initiated grand juries may lead scholars to conclude that the overall grand jury system in Kansas needs reform, however, that is beyond the scope of this article.

own political agendas. The Kansas Legislature should also repeal H.B. 2182, so the person who files the citizen-initiated petition is no longer required to be called as the first witness before the grand jurors. Finally, it is crucial that researchers and scholars conduct additional research on citizen-initiated grand juries to ensure that legislators are fully aware of the benefits and drawbacks of the system before the Legislature further amends the Kansas citizen-initiated grand jury statute.