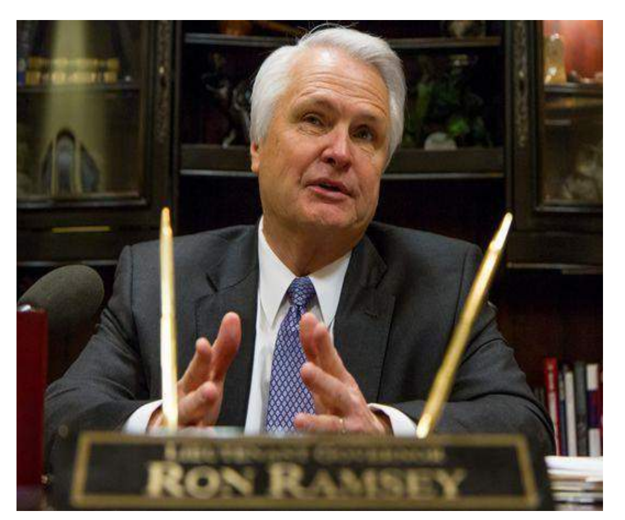
Winning Retention in a Hostile Political Environment

How Supporters of Three State Supreme Court Justices Prevailed in the 2014 Tennessee Retention Elections



A Justice at Stake report
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Executive Summary

The summer of 2014's hard-fought Tennessee Supreme Court retention elections cost a record-breaking $2.5 million, and dominated political headlines well in advance of the 2014 midterm elections. Total on-the-books spending for pro-retention forces clocked in around $1.5 million; those vying to unseat the three justices spent over $1 million, and no one knows how much "dark money" – untraceable and undisclosed – may have otherwise been committed to electioneering efforts.

Yet through the lens of Tennessee politics, the 2014 retention cycle meant much more than high spending and national attention. In a state where every statewide, elected legislative or executive office was held by a Republican, and in a political environment where nearly three out of every four voters identified as conservative, the 2014 retention elections tested whether swelling political ambitions could conquer the "final frontier" of Tennessee politics – the Tennessee Supreme Court.

For those who supported retaining the justices, the battle lines encompassed much more than protecting the Attorney General – a Democrat – from the enmity of the Lieutenant Governor, a conservative Republican. Instead, the election was a measurement of just how far Tennesseans would go to protect the integrity of their legal system. As Margaret Behm, a key on-the-ground strategist, remarked, "This was about justice not being for sale."

This Justice at Stake report sheds light on the stories that defined the 2014 Tennessee retention elections. It gauges the impacts of the most influential organizations and individuals involved, and provides a set of battle-tested guidelines for winning retention elections across the country. Perhaps most importantly, it offers a real-world example of how early and effective organizing, polling, messaging, fundraising, and public education – among other campaign activities – can translate into a meaningful and measurable victory in a hostile political environment. In total, the goal of this report is to serve as a templated, replicable program strategy for fair courts advocates faced with a retention election, while also highlighting the specific value-adds that Justice at Stake contributed to the broader effort.

Section I of this report provides a brief history of Tennessee's judicial selection system – from its origins in popular elections to the adoption of to the "Tennessee Plan" and beyond; section II explores the strategies used by those who opposed and supported retention, including the essential public education work performed by Justice at Stake. Section III then recaps the electoral results from Election Day, detailing the voter insights Justice at Stake captured through an election night poll. Section IV provides post-election analyses of the significant factors – campaign-led or otherwise – that determined the outcome of the elections. Finally, Section V synthesizes this knowledge to provide a step-by-step playbook for winning a retention election in a hostile political environment.

In preparing this report, Justice at Stake conducted a comprehensive review of the messaging, communications, outreach, fundraising, public education, strategy, and partnership engagement operations of all significant players during the most expensive supreme court contest in Tennessee history. The report draws significantly from available polling data, media coverage, election result data, and financial disclosures filed with the Tennessee Registry of Election Finances, as well as from conversations with those central to the election cycle, including

- Brenda Gadd – Campaign Manager for the justices' campaign
- Victoria McCullough – Chief Strategist for the "Keep Tennessee Courts Fair" independent expenditure campaign
- David Cooley – Senior Advisor to the justices' campaigns
- Steve Smith – General Consultant to the justices' campaigns
- Allan Ramsaur – Executive Director of the Tennessee Bar Association
- Suzanne Keith – Executive Director of the Tennessee Association for Justice
- Margaret Behm – Attorney with Dodson Parker Behm & Capparella, P.C.
- Alistair Newbern – Associate Clinical Professor of Law at Vanderbilt University Law School
- Penny White – Professor of Law at the University of Tennessee Law School and former Justice of the Tennessee Supreme Court
- Debra Erenberg – State Affairs Director for Justice at Stake
- Laurie Kinney – Director of Communications and Public Education for Justice at Stake
- Peter Starzynski – Senior Organizer for Justice at Stake

Though the 2014 retention elections ultimately saw the justices retained by roughly seven-point margins, all of the necessary ingredients for an anti-retention victory were nonetheless on display. "Partisans and special interests opened their checkbooks to send a message of intimidation to courts not just in Tennessee, but across America," Bert Brandenburg, Executive Director of Justice at Stake, observed when the dust finally cleared. Indeed, national projects like the Republican State Leadership Conference's Judicial Fairness Initiative – launched in April 2014 – have been designed to dispatch immense resources to judicial races. And according to one Tennessee campaign strategist, once Charles and David Koch – the primary financiers of Americans for Prosperity – are able to coordinate more effectively with their state advocates, "we'll all be in trouble." As Brandenburg told the *Knoxville News Sentinel* in the midst of Tennessee's retention cycle, "If [Americans for Prosperity] has decided to spend the kind of money in a judicial race that it has spent in other contests around the country, this could transform judicial politics in the United States."

The perfect storm may not be far away.

I. Background of the 2014 Retention Cycle

A Primer on the Politics, Political Structure, and Judicial Selection System of Tennessee

In Tennessee, there are six state officials who are chosen through statewide elections. Five of them sit on the Tennessee Supreme Court.

For over one hundred years,[1] these justices were selected through direct elections. Then, after Tennessee Republicans won a U.S. Senate seat in 1966 – and then the governor's office four years later – Tennessee Democrats moved quickly to solidify their remaining power by implementing the "Tennessee Plan" in 1971.

Similar to how 23 other states select their appellate judges when a vacancy arises, the Tennessee Plan tasked an independent government agency – the Tennessee Judicial Nominating Commission – with submitting the names of three nominees to the governor, who then appointed one candidate to the bench. At the next general election – and at the end of every subsequent eight-year term – voters decide whether each appellate judge is to be "retained" or "replaced." Judicial retention elections always take place in August of even-numbered years, during the statewide primary.

For twenty-five years – from 1971 to 1996 – no Tennessee Supreme Court justice ever lost a retention election. But in 1996, Justice Penny White – the first female justice on the court – joined, but did not write, a 3-2 majority opinion finding that there was insufficient evidence to uphold a defendant's death sentence under Tennessee's capital punishment law. In response, state Republicans, including the governor and both U.S. Senators, cried foul. A few weeks later, after a borderline-vituperative campaign against her, Justice White lost her retention election. The chief justice who joined the same controversial opinion narrowly won retention two years later.

Retention elections receded from the limelight eight years later, as three justices were able to win retention with roughly 75% of the vote, though they had raised no money and had engaged in very little campaigning.

The pendulum would swing back in 2014, as Chief Justice Gary Wade, Justice Cornelia Clark, and Justice Sharon Lee – all appointees of former Democratic Governor Phil Bredesen – faced the most expensive and headline-grabbing retention elections in Tennessee history. But the battle in 2014 was not just about who sits on the state's high court.

The Tennessee Supreme Court is the only high court in the nation that appoints its state attorney general, and in 2006, the court voted to appoint Bob Cooper, a Democrat whose father had served on the court. In 2007, then-State Senator Ron Ramsey was elected by the Tennessee State Senate to be the Speaker of the Senate, which by operation of Tennessee law automatically made him the state's Lieutenant Governor as well, and the second-most powerful politician in the state. As one prominent Tennessee politician recalled it, Ramsey's rise was an adversarial process "reminiscent of Newt Gingrich."

With Gov. Bredesen term-limited four years later, Bill Haslam, the two-term, moderate Mayor of Knoxville, defeated Ramsey – the Tea Party favorite who ran on a platform that included reforming Tennessee's judicial selection process – in the Republican primary, before being elected the 49th governor of Tennessee.

Whether due to political ambitions, an absence of voter accountability, or perceived incongruities with the Tennessee Constitution, Tennessee Republicans have long criticized the Tennessee Plan.[2] These opponents relied upon Article VI, Section 3 of the Tennessee Constitution, which (until amended in November 2014) read "The judges of the Supreme Court shall be elected by the qualified voters of the state," as the conduit for their challenges.[3]

In accordance with Tennessee's sunset laws, the Tennessee Plan – adopted as statute, but never written into the Constitution – was set to expire on June 30, 2013. State Senator Brian Kelsey, serving as chairman of the senate judiciary committee, saw this as an opportunity to reform the system, and introduced a proposal in 2012 – known as Amendment 2 – that would transform Tennessee's selection system into a modified federal-style approach, wherein appellate judges would be nominated by the governor, confirmed by the full legislature, and then subject to retention elections every eight years thereafter. Because the Tennessee Constitution requires that ballot measures pass the General Assembly two times before they can appear on the ballot, Amendment 2 needed to be, and ultimately was, approved by the legislature in 2012 and 2013. Thus when the Tennessee Plan finally expired in June 2013 – with more than one full year until Kelsey's proposal would be put to voters – Tennessee leaders found themselves with no method of filling judicial vacancies. State Republicans had forced the issue, and, one way or another, 2014 was certain to be a year of action.

The Whisper Campaign Begins: January—April

Though the justices held out hope that August 2014 would mirror the uneventful retention elections of August 2006, by January 2014 a whisper campaign had started to build against them. Two months later, a top-level Democratic political consultant got wind of a consolidating anti-retention effort, "followed a hunch," and started corralling potential supporters and funders for the justices. Yet somehow, the issue failed to gain real traction until Justice at Stake participated in a forum on judicial selection sponsored by the Nashville chapter of the American Constitution Society at Vanderbilt University Law School. Though initially designed as an opportunity to discuss the potential impact of Amendment 2, the Vanderbilt forum ended up serving as the flashpoint for pro-retention organizing.

The Heart of the Campaign: May—August

Conversations turned to action two months later in May, as fair courts advocates began to hear rumors that the Tennessee Chapter of Americans for Prosperity was contemplating whether or not to invest heavily in the election. If the fear of Koch money was fuel for concern, a leaked PowerPoint presentation from Lt. Gov. Ramsey lit the match. First uncovered by Nashville's News Channel 5, Ramsey's PowerPoint made clear that he had been soliciting the business community and outside conservative groups in hopes of acquiring $2 million to challenge the justices. The presentation – which is included in the Appendix to this report – outlined Ramsey's plans to oust the justices by portraying them as "soft on crime" and anti-business, among other charges. With all hopes of a quiet election now gone, the three justices recruited consultants and hired staff, and began a two-and-a-half month campaign across the state. Tennessee's Supreme Court retention election was quickly becoming a nationally-watched race, and seemed poised to turn ugly.

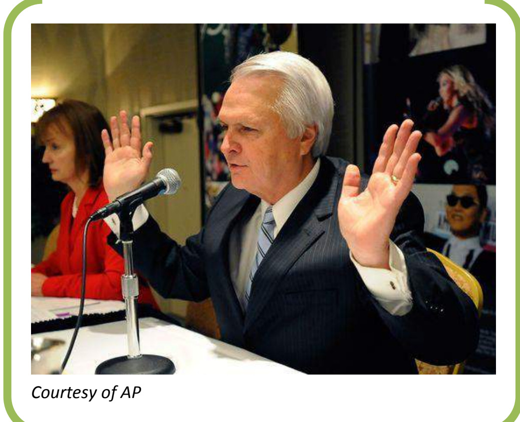
Unfortunately for those who hoped to oust and then replace the three justices, Ramsey proved to be exceedingly unartful. As described in Section IV, he committed a number of strategic errors that not only helped motivate pro-retention forces, but may have dissuaded outside interests from making further investments in his cause. By the end of the campaign, it was clear that the threat of massive outside spending would never materialize. Ramsey took himself out of the spotlight, the TV presence of the anti-retention campaign was fading, and the justices ultimately sailed to retention by an average margin of around six points.[4]

II. Campaign Strategies

"Tennessee's being put on notice that their courts, like those of many other states, are now officially in the crosshairs of groups who view courts as one more investment."
–Bert Brandenburg, *The Washington Post*, August 8th, 2014.

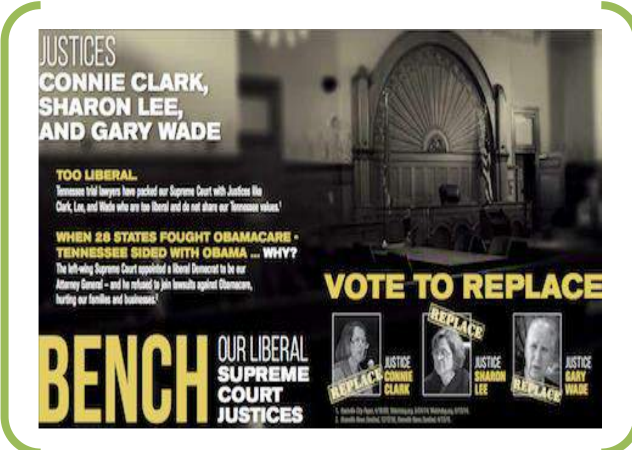
Anti-retention

Seeing "an opportunity for a group…that wants to have a Republican, pro-business, anti-crime attorney general to elect [him] in a relatively cheap way," [5] **Lieutenant Governor Ron Ramsey** spearheaded, funded, and sometimes himself delivered the most high-profile efforts of the anti-retention campaign.



Courtesy of AP

Ramsey was the single most influential figure in the anti-retention enterprise: though falling far short of his fundraising goal of $2 million, he nonetheless pumped three-quarters of his "RAAMPAC" money – a whopping $605,000 – into the election. The political undertone he helped push seemed simple enough: if you're a Republican, you vote to replace. But Ramsey knew better than that, and wrapped up his naked political ambitions in what one organizer called a "beautiful and compelling story" woven around three central messages: the justices were "too liberal for Tennessee," anti-business, helped advance Obamacare, and were "soft on crime." The final fourth of this messaging – perceived by many supporters of the justices as a dreaded "silver bullet" – was itself reinforced by instances where the justices had allegedly overturned death sentences. As Laurie Kinney, Director of Communications and Public Education for Justice at Stake, told *The New York Times* after the election, attacking judges as being "soft on crime" is an unsurprising and frequent line of attack.



Ramsey was also a member of the second biggest funder of anti-retention efforts, the Washington, D.C.-based **Republican State Leadership Committee**. Financed in large part by the Koch Brothers, the RSLC spent $187,385 on mailers and TV ads, and also gave money to the Tennessee Forum. A partner group of the RSLC, the **State Government Leadership Foundation**, also spent an estimated $41,310 on TV ads.

Though these groups' ads also pushed the "soft on crime" narrative, their primary messages were more

narrowly focused, and zeroed in on labelling the justices as liberal and tying them to Obamacare. For example, a July mailer paid for by the RSLC pressed voters to "bench our liberal supreme court justices."

When it was not channeling its resources into advertisements, the RSLC was helping to fund the **Tennessee Forum**, a self-described "independent political issues organization that advocates for better government" founded in 2000.

The Forum played a critical role for replacement efforts, serving as the local conduit for Ramsey's finances. In total, the Forum received over three-quarters of its funding – $605,000 – from either Ramsey himself or the special interests that had contributed to his "RAAMPAC" fund. The Forum was also the largest overall spender that summer, pumping over $787,000 into electioneering efforts that included the same soft-on-crime and "too liberal for Tennessee" messaging used by Ramsey and the RSLC. For example, on July 11, the Forum distributed a mailing that urged voters to "Drop the hammer on our liberal Supreme Court," and TV ads asking voters to "break the liberal monopoly on Tennessee's Supreme Court" and calling the court "liberal on crime." These messages were pushed through TV ads and seven rounds of mailers that targeted Republican voters.

Both the Tennessee Forum and the RSLC were funded in part by the Tennessee Chapter of **Americans for Prosperity** PAC, which is itself financed by Charles and David Koch. Billing itself as "the state's foremost advocate for economic freedom," AFP funded these organizations in order to "educate the public on the liberal records" of the justices.[6] While AFP-Tennessee criticized the justices in their radio ads, because they never expressly advocated for their defeat, they were not required to disclose their expenditures.

Another local group, **Tennesseans for Judicial Accountability**, was formed in 2013 by two Republican attorneys who "for years have fought to ensure that our courts actually follow the Constitutions of Tennessee and the United States." The group issued a press release in June calling for the replacement of the three justices, but retracted their positioning a few days later in an interview with News Channel 5.

Pro-Retention

Despite hearing rumors of organized opposition, most supporters of the justices spent the earliest days of the cycle in denial. Yet when Ramsey's strategy document overtook local headlines, a full-scale retention campaign kicked into high gear.

First and foremost were **the Justices** themselves, whose campaign was put together by a former high-level Democratic campaign manager and a veteran judicial campaign consultant, the latter who also helped get the justices' independent expenditure team hired, offering some target fundraising and advertising goals before joining the campaign. As members of the campaign staff related, having only 2-3 people helped the boots-on-the-ground effort get up and running, and made for quick decision-making. By the first week of May, Brenda Gadd would be a full-time campaign manager, and her team began firing on all cylinders soon after: good, early polling helped establish the lay of the land, fundraising efforts leaned on the legal community and targeted client distribution lists and newsletters, field strategy targeted urban areas which have higher voter turnout, and public education sought to teach likely voters about retention elections, how to vote in them, and what exactly was at stake.

"I guess we are getting a lesson in hardball politics."
– Chief Justice Gary Wade

Courtesy of Kingsport Times-News, David Grace/AP

As the Tennessee Democratic Party was underfunded and polarizing to the electorate, the justices' campaign had to look for a political infrastructure elsewhere, and found it in the broader Tennessee legal community, which included roughly 26,000 attorneys. In the words of one campaign team member, "while there has been so much done to fragment the lawyer community, [this] was one thing that they all came together on." Lawyers joined on with a sense of urgency, helping to dig through the justice's cases and flag them for potential weak points (most notably, their death penalty cases), and looking into the justices' backgrounds, including their tax records.

From the outset, the campaign's leaders divided Tennessee's 95 counties into three tiers, organized by potential voter turnout. They then got out early to define the justices. This was in truth a "huge gamble," one member of the campaign staff said, as "we did not have enough money to finish with TV."

In order to build broad support, the campaign contacted current and former district attorneys, an outreach strategy that culminated in a July press event where local DAs endorsed the justices. Split up to cover more ground, the justices themselves put a particular emphasis on bipartisan, and extensive, outreach. While it may have relied on the legal community as a stand-in for a political party structure, the campaign recognized the need to go beyond the borders of the formal legal community. "[Justice] Sharon Lee was in a black church every Sunday in Memphis," one campaigner said, "while at the same time, [Chief Justice] Gary Wade would be in Knoxville."

Justice	Total contributions
Gary Wade	**$526,013.52**
Cornelia Clark	**$301,818.22**
Sharon Lee	**$324,518.01**

Though faced with problems both financial (as the justices could not run a coordinated campaign, they had to have three separate campaign accounts – this meant that at every fundraiser, especially committed contributors would have to write three separate checks) and ethical (could the justices all take a picture together? Or was that an unethical endorsement of each other?), the justices' campaign spent a combined $1.15 million. Intent on spending money wisely (for example, by refusing to buy yard signs) the justices were nonetheless each left with some debt when the dust settled. "We spent every single penny," one campaign staffer related.

Virtually all of the campaign's funding came from attorneys, nearly all of whom were trial lawyers, resulting in what one strategist called "a mix of people who care about the issue and who benefit from giving to the justices." As Bert Brandenburg reflected, "to survive, Tennessee's Supreme Court justices have had to become professional fundraisers, often soliciting money from parties who will appear before them in court.

The justices' messaging relied on themes that attempted to transcend the politicization of the campaign. For example, on July 11 the justices began airing a TV ad that stressed their dedication to the Tennessee Constitution and the U.S. Constitution. Though it did not initially test highly in the campaign's messaging research, the notion of "keeping politics out of the court" was effective. In order to combat the "soft on crime" narrative, another ad showcased an endorsement from the Fraternal Order of Police. The justices also highlighted how the **Judicial Performance Evaluation Committee**, an independent agency that rates judges before they face voters in retention elections, recommended that the three of them be retained.

The justices' messaging campaign also capitalized on endorsements from the Nashville Bar Association, the mayor of Memphis, and two prominent Republican jurists: Lew Connor – a former Tennessee Court of Appeals judge – and William "Mickey" Barker, former chief justice of the court. The justices' communications director mapped out all of the editorial boards from all of the papers – especially targeting the lawyers on such boards – and purposely focused on local papers and radio programs. Campaign leaders organized media trainings with media consultants who prepped the justices for their interviews. Vocal support from the bar was so strong that former Tennessee Supreme Court Chief Justice Frank Drowota and several other attorneys met with the editorial board of Tennessee's most influential newspaper – *The Tennessean* – to lay out their concerns with the replacement crowd. Characterizing the campaign as a partisan effort to stack the court, Drowota remarked "To have politics come into the courts makes absolutely no sense. You don't want a politicized court. You want a fair, impartial court." Each of these endorsements gave the campaign another reason to hold a press event or to engage their supporters through social media.

The justices' campaigns funded an entity called **Keep Tennessee Courts Fair**, which was launched with a mission to "make sure that our constitution is upheld, and that our courts remain impartial. Period." Though the organization was hindered by a peculiar legal curveball – instead of having one account that could be funded by everyone, each justice had to share in each expense equally – the campaign was able to raise enough money to purchase TV time toward the close of the cycle.

Though considerably weaker than comparable organizations in other states and initially intending to remain on the sideline, the **Tennessee Association for Justice** (TAFJ) and its PAC, **Tennesseans for Fair Courts**, entered the fray early on, and ended up serving as the essential organizers, messengers, and funders for the justices.

A meeting with prominent public figures in late April ultimately sparked action both in- and outside the association. With 100 days to go until the election, Gov. Haslam, former Governor Phil Bredesen, and former U.S. Senator Fred Thompson convened 55

people at the Governor's mansion to discuss Amendment 2. The conversation was cut-and-dried until an attorney from the TAFJ posited that if retention elections in theory are such a good thing, then these three justices in practice surely should be retained.

The response from the crowd was overwhelming, and turned out to be priceless: Lew Connor shifted his position to join the retention efforts, the Nashville Bar Association changed the agenda for its next meeting from Amendment 2 to the retention elections, and Gov. Haslam himself commended the attorney for bringing up "such a good point."

After the meeting, TAFJ attorneys recommended that an independent expenditure campaign for the justices be started, and that a "lawyers coalition" of attorneys identified by TAFJ leaders as necessities be assembled. The infrastructure was, in some ways, already available: five years earlier, a coalition had learned to work together from defeating an English-language-only amendment in Nashville. Now faced with defending the three justices, the coalition held weekly get-out-the-vote meetings with a variety of attendees: representatives of law firms, the Chamber of Commerce, a powerful African-American community (tapping into an organizing effort from May that helped a number of African-American judges be elected to the bench), labor, an immigration and refugee rights coalition, Kurdish and Muslim communities who put out immigrant-specific emails – even the Fraternal Order of Police, who released a statement about why retention was important for law enforcement.

When it came to fundraising, "the judges couldn't ask for money," one attorney recalled, "so we knew we had to help them." And help them they did. A fundraiser on May 14 reportedly raised $100,000 for the justices. Attorneys were savvy about using their client distribution lists to organize fundraisers. In the end, Tennesseans for Fair Courts spent about $350,000 backing the justices.[7]

To help with messaging, the Tennessee Association for Justice solicited public education information from JAS, and hired a consultant who helped devise a long-game strategy. First things first, they organized a statewide "Save our State" tour that brought the justices out to rural communities and suburbs. "It was a big deal for the Supreme Court justices to come out to these rural communities," one attorney related. With a messaging strategy that relied on a public animus for out-of-state money, the perils of having one party control all three branches of government, and by using positive, protective language such as "justice is not for sale," "keep our courts fair and impartial," and "uphold the Constitution," attorneys and local bar associations sent emails, solicited their local newspapers and radio stations, and made affirmative asks of local reporters. "We used this as an attack on the independence of the judiciary," one attorney said. And on Election Day, advocates prodded their constituents across the finish line by sending last-minute emails to supporters.

Weeks after the election, it was revealed that the **Tennessee Democratic Party** also raised $200,000 for the justices, and, along with another $100,000 the party had on hand,[8] allegedly spent $200,000 on TV and radio ads and another $100,000 on direct mail. The party also contributed $125,000 to Tennesseans for Fair Courts.

The **Tennessee Lawyers Association for Women** (LAW), seeing the retention elections as an opportunity to activate its membership, set the model for pushing a variety of organizations – including bar associations – to have their boards adopt resolutions that either promoted voter education around retention elections, or that advocated outright for retention. In what was called a "very

effective" public education campaign, LAW assembled and distributed talking points, sample emails, and weekly messages to voters counting the days until Election Day, and detailing what voters "need to tell your neighbors now."

By July 25, Tennessee's News Channel 5 would report that "new figures, from the watchdog group Justice at Stake, show TV spending is about evenly split between those campaigning to keep three incumbent justices and those who want them replaced."

Other Powerful Interests

Through the course of the election, not a single newspaper that weighed in on the retention elections failed to endorse the justices. Thus the **mainstream media** served as an influential outside actor. Most notable were the efforts of Phil Williams, Chief Investigative Reporter for Nashville's News Channel 5, among the top three TV stations in the state. Williams not only broke the story of Ramsey's leaked strategy document in May, from that day forward, he devoted three months to investigating the elections. Williams released a new angle on the story – from outside spending to bumbling interviews from the Lieutenant Governor – every seven to ten days. "Phil Williams single-handedly led the earned media," one pro-retention campaigner observed.

Though one conservative blog accused Williams of being "totally in the tank" for the justices,[9] Williams was also known to ask the pro-retention forces tough questions on a few occasions. As one campaigner recalled, when a TV ad ran stating that the justices had supported the Second Amendment – a federally endowed right – Williams called the campaign to ask for a specific high court decision that could support their ad.

The **Tennessee Bar Association**, termed "a big, blunt instrument" by one advocate, was a "very serious" player that "ended up being really good" for the retention effort. (Unlike other state bar associations, the TBA is a voluntary bar, effectively meaning that Tennessee lawyers do not have to be members in order to practice law in Tennessee.) Though the bar was restricted by both a long-standing policy of not making endorsements for judicial candidates as well as the other, more typical constraints that 501(c)3 organizations face – it was able to frame the statewide conversation in a way that helped neutralize the appearance of partisanship or ideology, drive a "fair and impartial courts" message, and help lawyers understand their importance in the election. In order to keep the election on their members' minds, the bar regularly carried news about it through its *TBA Today* daily email blast, which reached roughly 12,000 members. The bar's network of political operatives was also able to make calls to potential funders, and encouraged very prominent members to raise money and provide cover from the legal community. At their state convention in mid-June, the TBA invited Alistair Newbern from ACS to speak about the retention election. Yet perhaps most importantly, it issued a press release on June 13th relating that a recent poll of its members showed nine out of ten members supported retention. The Bar had never polled its membership before, recognizing that "the TBA is taking this unprecedented step as part of its efforts to help ensure that the 2014 judicial elections maintain a fair, impartial and accountable judiciary."

Results of TBA Poll			
Justice	**Highly Recommended**	**Recommended**	**Not Recommended**
Justice Cornelia Clark	74.4%	18.4%	7.2%
Justice Sharon Lee	75.9%	17.3%	6.8%
Chief Justice Gary Wade	76.7%	17.0%	6.3%

Finally, demonstrating what one campaign leader referred to as "forthright leadership," the TBA compiled and publicized resolutions that other local bar associations had issued in support of retention, including that of the Nashville Bar Association. The Napier Looby Bar Association, an organization "dedicated to the advancement and development of black attorneys,"[10] also hosted events in support of the retention effort.

Though on the surface he seemed removed from a fight between the legislative and judicial branches of a government he leads, **Governor Bill Haslam** was incapable of ignoring the connection between the judicial selection amendment he favored (Amendment 2) and the need to protect the three justices. No doubt inspired by the applause the attorney from the Tennessee Association for Justice had elicited at the 100-day mark, Haslam went on the record to say that the politicization of the retention election was "dangerous." Even more tellingly, the Governor's wife and mother gave the maximum contribution to the three justices.

The **Tennessee League of Women Voters** – comprised of self-described "regular folks, retired teachers and the like" – made an oversized impact on the fair courts public education efforts. Though the retention elections occupied their "late-evening, volunteer kind of stuff" – and though the organization only has one half-time employee – the League joined the fray by bringing public education efforts to new, non-legal audiences, sending emails across the state and by putting together a compelling, 20-page PowerPoint presentation that used accessible language to educate people about how to talk about fair courts issues. These efforts culminated in a radio buy – the likes of which "has not been seen in ages" – that ran twice a day for a two-week period on public radio outlets covering five metropolitan areas. While the League did not formally take a pro-retention position, its radio spots, which totaled about $4,000, spoke to the importance of participating in the retention elections.

The **Nashville Chapter of the American Constitution Society** played a key role in organizing the March forum at Vanderbilt University Law School, and was represented by Alistair Newbern when she spoke to lawyers groups like the Lawyers' Association for Women and the Napier-Looby Bar Association about the role that money plays in

judicial campaigns. Though its contributions may have been minimal (ACS can and did not endorse the justices) the group was effective at presenting a core message it had forged from JAS's talking points at a handful of forums.

Justice at Stake

Justice at Stake (JAS) and the Justice at Stake Campaign (JASC) do not endorse candidates in judicial elections. However, from being among the first to sound the alarm on the creeping politicization of the retention elections to commissioning Election Day polling that captured the story of the cycle, **Justice at Stake** was highly engaged and uniquely influential throughout the entirety of the retention cycle.

Months before the retention rumor mill began churning, JAS arranged a January poll that recorded the values that voters wanted in their courts – fair, impartial, allegiant to the Constitution – as well as their opinions on the Tennessee Supreme Court. Then in March, as advocates first came together to diagnose the emergent Amendment 2, Justice at Stake's Director of State Affairs, Debra Erenberg, was at the table and leading the discussion. Traveling to Nashville to assess the political landscape, Debra met with key fair courts leaders, and established essential relationships for the road ahead. Forecasting how anti-retention efforts could cheapen the Tennessee Supreme Court – which in turn could endanger the assailed Tennessee Plan – JAS made a strategic decision to refocus its efforts on the retention elections, viewing them as both a power grab to politicize the court and as an example of the harmful effects of huge amounts of money being spent on judicial elections.

Justice at Stake met early on with key organizers, and encouraged advocates to explore partnerships with other entities, which culminated in a targeted email to a community of lawyers. JAS also advised local advocates of the importance of creating a local 501(c)(4) organization in the event that their supporters wanted to explicitly support the justices. Finally, before commissioning a second poll, JAS reached out to local partners to solicit questions that may be of use to their messaging and public education efforts.

Then, in March, JAS moderated an important panel on judicial selection at a forum at Vanderbilt University Law School. Though restrained by its non-profit status from deeper involvement, one campaign leader remarked that JAS "did as much as humanly possible to educate us on the campaign."

JAS returned to Tennessee in May with JAS and JASC poll results showing that Tennessee voters had a softly held positive impression of their courts. Finding a passionate, albeit unorganized, advocacy infrastructure, JAS worked with key partners, including the League of Women Voters and the Tennessee Association for Justice, to convene advocates for a discussion of the polling info, which moved quickly from Amendment 2 to the more immediate issue of the retention elections. JAS also used this opportunity to share best practices and lessons learned from its previous public education work around retention elections in Florida and Iowa, and helped to connect Tennessee advocates with its Florida contacts. According to Suzanne Keith, JAS also used this time to help craft public education messages informed by a second round of polling.

Later in May, once JAS got a hold of Ramsey's infamous PowerPoint presentation, it partnered with the Tennessee Association for Justice to immediately assess the validity of Ramsey's claims. This culminated

in a 2014 legal memo by Justice at Stake Campaign that exposed Ramsey's naked political agenda by debunking the attacks and allegations he made against the court and Attorney General Bob Cooper (included in the Appendix to this report). This original research was shared with fair courts partners and the media, and inspired News Channel 5's Phil Williams to further investigate Ramsey's claims, resulting in a humbling interview with Ramsey where, put on the hot seat, Ramsey subtly acknowledged the deceptive spin he used on the issues.

As supporters of the justices hit the road, public advocates like Alistair Newbern of the Nashville Chapter of the American Constitution Society relied on JAS's research, publications, and polling data that reflected voters' concern over the influence of money in judicial campaigns and advertisements.

Throughout the summer, JAS focused heavily on communications work, cultivating relationships with local reporters and developing an entire infrastructure responsive to events on the ground. At the height of its engagement, JAS had four employees devoted to tracking and reporting on spending, and took advantage of a new law requiring TV stations to upload their political spending to the Federal Communications Commission website. This opportunity to test drive real-time reporting on judicial campaign spending led JAS to realize that there was a new need for data-driven reporting.

Over the remainder of the campaign cycle, JAS tracked the money and advertising that flooded the retention election in real-time, putting out releases that tallied spending as it continued to climb. In addition, JAS connected local partners to the developments and worked to help shape and then elevate the story to partners in other states. Often times, JAS's stories on spending went right down the line to local reporters, such as Phil Williams at News Channel 5. Williams would cover the story from the local perspective, and then cite JAS as a means of confirming and validating the information with national experts, helping to educate voters about the non-political purposes of retention elections. This spillover effect also influenced print media, culminating in *The Tennessean*'s endorsement of the justices.

At the same time, JAS's storytelling began to elevate the retention elections to a national story, allowing JAS's framing of the issue to present Tennessee as a microcosm of the much larger, national problem surrounding money in judicial politics. These efforts culminated in a tremendous amount of exposure; *The New York Times* sent a reporter to Tennessee, JAS's Director of Communications, Laurie Kinney, spoke to national reporters who related that they had thought of doing some stories on judicial elections in the fall, but based on JAS's work, were going to pursue it now.

According to Kinney, these developments demonstrated the importance of creating media hooks – often grounded in spending numbers or polling research – and shows how, done right, it is possible to make such stories more attractive to local and national outlets, which JAS can then supplement with a storyline and context, research, all while being considerate of local advocates' needs and preferences.

From such exposure, JAS came to be seen as a helpful resource in the field. Its work had developed such a following that national and state reporters would contact the office and inquire when new figures and stories would be coming out. JAS had become the "go-to" source for information on spending in the Tennessee retention elections. When all was said and done, between May and August, JAS produced 54 stories on its Gavel Grab blog, reached thousands of people through its social media channels, and posted dozens of stories on Facebook and Twitter.

Yet at the same time, pro-replacement forces called out JAS as being funded by "the left-wing George Soros,"[11] and for "actively looking for an experienced organizer to develop and implement strategies to

help 'advance or defend fair courts' in Tennessee, and three other states."[12] According to one inside source, a running joke among the justices became, "Can George Soros at least send us some money?" Eschewing the idea that political ideology was a factor, Bert Brandenburg told the *Knoxville News Sentinel* in the midst of the heated cycle that "the continued flood of money into judicial elections from all sides is already a threat to impartial justice."

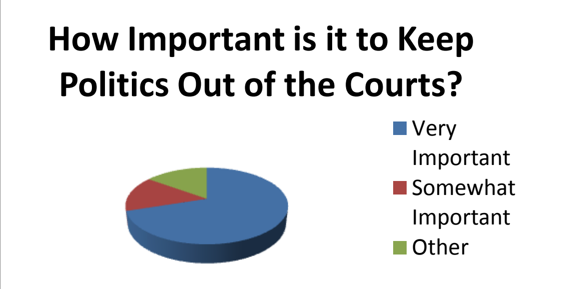
Finally, JAS conducted an exit poll on the night of the election, helping to shape, inform, and ultimately drive the media narrative in the aftermath.

III. The Elections

As Tennessee saw the most expensive retention election in its history, voters hit the polls with clearly defined motivations that echoed high price tag messaging.

Voter turnout for the August 2014 primary was 28%, and 98% of those who voted for Governor in Tennessee's August primary also cast a ballot in the retention elections. This was a 13% increase from the last retention elections in 2006.[13] Justices Wade, Lee, and Clark received 56.6%, 56.0%, and 55.3% support respectively, compared to each of the 20 appeals court judges up for retention, who each received 62.5% to 65.6% support. When Sharon Lee faced retention in 2010, she had received 68.2% of the vote. In truth, the anti-retention effort had made their races far closer than that of any justice who previously survived retention. As Bert Brandenburg told *The New York Times* on August 5, 2014, "Tennessee has joined a growing club of states where courts face a tidal wave of spending and political pressure."

Election night polling conducted by Justice at Stake showed that 85% of voters felt that it was "very" or "somewhat" important to keep politics out of the courts, with a full 70% choosing "very important" (JAS's press release on the poll is included in the appendix to this report). Also, 80% of voters said they were "very" or "somewhat" concerned that politically charged retention elections might put pressure on judges to decide cases based on public opinion, while two-thirds of voters related that they were "very" or "somewhat" concerned about the role that out-of-state interests played in the retention election. "Tennessee voters decisively rejected efforts to politicize their courts," remarked Bert Brandenburg. "They want judges to answer to the law, not political pressure."



Candidate	Election Vote
Sharon Lee	56.0% ✓
Cornelia Clark	55.3% ✓
Gary Wade	56.6% ✓

IV. Analysis, Conclusions, and Lessons Learned

What really made the difference that summer? This section explores a range of factors – from those out of everyone's control to those attributable to personal blunders – that shaped the results in August.

External Factors

a. **Political environment, ballot language, and timing.** The political environment in 2014 was nothing short of hostile. The news story about George Soros hiring a field organizer via JAS to "work on Tennessee's elections" ran for a full day (despite its lack of veracity), and on the other side were harsh critiques of AFP spending Koch brothers money, "scaring people to death to be identified either way," as one neutral party put it. Furthermore, Tennessee lawyers had become much more politically active than usual due to the surge in legislative activity regarding judicial selection methods. And overall, the wariness and depressed funding levels of the Tennessee Democratic Party led the pro-retention campaign leaders to avoid being overtly linked to the party, in turn creating an infrastructure vacuum that would be filled by the legal community.

   Also, the August 2014 elections served as a primary for every non-judicial candidate, and as a functional general election for the justices. Thus, turnout was critical. Yet as one senior campaign leader remarked, "there was no reason for a Democratic voter to go to the polls." The depressed Democratic base, in a state where that base is already minute, meant that the justices would be "swimming upstream." Probably the most influential candidate on the ticket was U.S. Senator Lamar Alexander, whose presence no doubt increased turnout among moderate Republicans. But in a political cycle that lacked close or polarizing primary races, supporters of both parties – and especially Democrats – lacked strong reasons to turn out to vote.

   For the first time in Tennessee history, the language used on the ballot asked voters to choose to "retain" or "replace" each justice, providing a potentially more alluring option than the traditional "yes" or "no." Finally, the timing of Tennessee's primary was significant because a late summer election meant there would be plenty of time for national organizations to refill their coffers before the November midterms, making the August primary a prime opportunity for them to "test the waters."

b. **High-profile campaigns.** Due to otherwise quiet primary elections, the high levels of outside spending, and the media's coverage of Ramsey's involvement, the retention elections became the most prominent issue on the ballot in August.

c. **Low-profile court.** Unlike similar retention races in Florida and Iowa, the Tennessee justices did not draw the ire of theirs opponents because of any high-profile, controversial decisions. Nor, as one strategist related, was the court actually perceived as "soft on crime." Add to this what Steve Smith called "a clear undercurrent" that the justices were not anti-business – corporate law firms were hosting fundraisers for them – and the fact that the 2014-2015 docket looked to be free of controversial cases, and one can see why Ramsey struggled to raise money against them. This lack

of substantive conflict also helped buoy retention supporters' claims of Ramsey's political motivations, and capitalize on a "don't politicize the courts" message.

d. **The ghost of Penny White?** In 1996, Justice Penny White drew the ire of Tennessee Republicans (and, eventually, Tennessee voters) over her apparent eagerness to overturn a death sentence in reflection of her personal opposition to the death penalty. White became the historical aberration that awakened many Tennesseans to the potential unfairness of retention elections, and may have been on voter's minds when they headed to the polls.

Anti-retention Factors

1. ✓ **Tapping into a conservative base.** Three out of every four voters in the August elections were Republicans. By making it a partisan race – labelling the judges as Democrats (or worse, liberals) – the replacement crowd was able to tap into a solidly red base.

2. ✓ **Fewer obstacles to fundraising.** In an election landscape where corporate contributions to the justices were illegal, individual contributions were capped at $3,800, and direct, personal solicitations from the justices were barred, Ramsey asked for and received $25,000 from the nursing home industry. This uneven playing field put the justices at a true disadvantage, and paved the way for Ramsey to potentially raise unlimited amounts of money.

3. ✗ **Lack of Strategic Coordination.** Though in positions to direct headlines and run the second-largest private company in the U.S. (the Koch Brothers, together worth over $100 billion), there did not appear to be a conversation about strategy between the two powerhouses leading the anti-retention efforts. While they were able to agree on some messaging approaches – such as tying the justices to Obamacare – they approached this common thread in very different ways.

4. ✗ **Late Start.** Ramsey did not launch the anti-retention efforts early enough to define the justices the way he needed to, or to be able to raise the $2 million he had imagined. More than one senior-level advocate remarked how the replacement effort may have been able to win had they raised money and produced ads earlier in the cycle.

5. ✗ **Poor, Polarizing Leadership.** Ramsey, while well-financed and in a position of considerable influence, had risen to power through an adversarial process that ultimately made his campaign against a difficult-to-vilify court a poor fit for his model for success. He was frequently described as a "power monger," perhaps explaining his decision to devote equal resources to all three justices, as opposed to targeting Cornelia Clark – the perceived weakest justice. As one high-level campaign leader put it, not only was "the word of the day 'overreach,'" but Ramsey's reliance on outside money proved that his efforts did not stem from a genuine interest in improving the judiciary, and even then, additional outside money probably failed to come through "because Ramsey messed [things] up." Ramsey, not the justices, ultimately became the focus of the election cycle. "I'd like to think it was all brilliance in those who supported the justices," another advocate related, "but I give [Ramsey] a lot of credit for screwing it up."

6. ✗ **Wrong (and Untrue) Messages.** The replacement crowd's problem with messaging was not a matter of articulation, but of emphasis. In the eyes of one senior-level advocate, had organizations

like the RSLC focused on the “soft on crime” narrative, they would have won. “We knew that that ‘soft on crime’ message could be the one thing we’d have a really hard time recovering from.” Though the court’s record on criminal justice cases did not provide “much to work with,” another advocate believed it to be the “silver bullet.” Instead, anti-retention forces became fixated on linking the justices to Obamacare, even though it was second to “soft on crime” by about ten points. So why use it? “They couldn’t get out of their ideological boxes,” one advocate offered. “It could have been because Ramsey’s funders, his D.C. people, wanted this message,” offered another.

To make matters worse, the justices’ opponents, including Ramsey, made a habit of making statements that could be shown to be untrue. For example, Ramsey’s misrepresentation-laden PowerPoint presentation featured so many errors that it served as fodder for the media, a windfall for the justices’ fundraising efforts, and a means of rallying support for the justices that they otherwise might not have had. Additional blunders – from Ramsey telling Phil Williams to “let the people decide” whether his PowerPoint was true or not, to Ramsey stating that he would not invest his own money into the campaign, only to do so later – corroded the collective integrity of the anti-retention campaign’s messaging.

Pro-retention Factors

1. ✔ **Money.** The justices and their supporters spent what one observer called “a pot load of money.” While they were able to raise and spend more money than their opponents by tapping into Tennesseans’ pocketbooks, a growing trend of out-of-state spending seems poised to shatter the comparative influence of in-state spending. “As long as there are no limits on outside money,” Justice Clark said, looking back on the election, “this will become the new normal.”[14]

2. ✔ **A protective bar.** According to key strategists, the story of the 2014 elections is “the story of the lawyers,” whose statewide bipartisan organizing skills were “just terrific.” “It didn’t matter if you were a Republican or a Democrat,” Margaret Behm recalled, “the lawyers upheld their ethical duty to protect the legal system,” rallied around the justices, and fought to make the election nonpartisan.

3. ✔ **Responsive, data-driven messaging**. Ramsey’s talking points, summed up as “ridiculous, inaccurate, and poorly researched,” by one observer, gave the justices an opening to put together talking points that exposed Ramsey’s political motivations, thus creating hundreds of ambassadors who felt as though they could present informed rebuttals to the Lieutenant Governor’s attacks. In addition, the justices’ messaging was based on early polling data that highlighted the presence of out-of-state money from the RSLC and AFP flowing into the anti-retention campaign, which resonated immensely with voters. Finally, poll-tested messages such as “politicians are trying to control the courts” and “fair and impartial” were boons for the pro-retention campaign.

4. ✘✔ **Inexperienced – but good – candidates.** For three public figures who genuinely never thought of themselves as political beings, the three justices worked hard throughout the summer – crisscrossing the state, attending several functions per day, and most importantly, not making any clear mistakes. The personalities of the justices were significant factors in the outcome; as judges, they felt much more stress and pressure than typical candidates for elected office. They also saw the importance of sticking together as a group – as retention election numbers are usually all within a few points of each other, they recognized that their constituents would be voting for “the court.”

However, as one observer shared, the justices' biggest opponents "were not the Republicans, but themselves." At times lacking motivation – and blinded by their political inexperience and their honest belief that Ramsey could effectively make them lose their jobs – the justices had to overcome these and other personal obstacles, and had to learn to bring their unique strengths to the campaign trail, from fundraising to public speaking to voter engagement.

5. ✗ **Scrambled Leadership.** Some advocates related that Keep Tennessee Courts Fair was plagued by poor leadership that disincentivized others from getting involved. Characterized by personal political motivations, egos, and what one advocate called "endless drama," the organization struggled to raise sufficient funds for a TV ad.

6. ✓ **Broad, often bipartisan support.** On June 20, Chief Justice Wade related that "Making the right decision is hard enough without looking around the courtroom trying to figure out who are Democrats and who are Republicans." Fortunately for him, the pro-retention crowd was smart enough to get the business community involved, as it made special efforts to bring business lawyers under their tent. They were able to raise money all across the state – from rural counties to supportive urban centers – and, perhaps most importantly, brought prominent Republican attorneys out in support of retention. Chief among them was Lew Connor, a former Tennessee Court of Appeals judge, who informally served as the publicly identified, moderate Republican spokesperson for retention. Connor even hosted a fundraiser for the justices at his law firm.

Courtesy of News Channel 5

7. ✓ **Support from the media.** While the justices' television ads were described as "B- work," the media was always in the justices' corner, whether in Op-Eds, columns, or investigative reporters on TV. Every newspaper that took a position on the issue endorsed the justices, and this stream of support made it harder for the "replace" crowd to gain the upper hand. Case in point: the pro-retention campaign was nearly called out for stating that the justices had supported a right to bear arms, but the hammer was never dropped. "Had the media been as hostile to us," one campaigner observed, "we would have had to have had much better answers."

8. ✓ **Effective public education.** As Suzanne Keith from the Tennessee Association for Justice summed up, the justices' early public education campaign generated "a really strong GOTV effort" that helped buoy the campaign's message throughout the summer.

Factors from Other Powerful Influences

1. **Investigative journalism.** "The ultimate arbiter," one high-level campaign staffer shared," was the earned media." More than any other outside influence, Tennessee's mainstream media was at times the great equalizer for both fundraising and messaging. After Phil Williams from News Channel 5 stumbled upon Ramsey's PowerPoint, the justices and Keep Tennessee Courts Fair used the exposure to grow their spending accounts. "Donors really responded to that," one fundraiser emphasized, "the media coverage helped us a ton at a critical phase of the campaign [early July]."

The media had come down solidly on the justices' characterization of the campaign, and much of it could be traced to Phil Williams. "We were lucky we had Phil Williams," Suzanne Keith said. "The outside groups saw what Phil Williams had done, and hesitated to get more involved." In some ways, Ramsey made it easy for Williams – speaking on the record about the PowerPoint presentation only further ensnared him in a painful narrative, which in turn helped swelled his opponents coffers. As Margaret Behm phrased it, "Phil was absolutely crucial on messaging. He was terrific."

2. **Strong organizing and public education efforts *beyond* the legal community**. The Tennessee Lawyers' Association for Women, the Nashville Bar, and the League of Women Voters devoted substantial time and resources to educating the public about what a retention election is, and why they are important. "It wasn't just the lawyers," as is frequently the case, one advocate highlighted. Seeing the issue as a vital bridge to new audiences, these organizations zeroed in on the elections and helped change the landscape around who's talking about retention. From reminding people to vote to the League purchasing a radio spot – "for the first time in a long time," in Diane Dillani's words – these advocates cultivated not only a firm knowledge base in their constituencies, but a sustained interest from their leadership as well.

3. **Republican governor stayed out**. The most powerful Republican in the state not only refrained from joining, funding, or supporting Ramsey's efforts, his wife and mother made maximum donations to the other side. Gov. Haslam's silence was not a sign of neutrality: it was an endorsement of the justices.

Justice at Stake Factors

1. ✓ **Starting the conversation early.** As Margaret Behm recalled, "if JAS hadn't been around to corral us, I'm not sure we would have been able to get the jumpstart we did. JAS was on top of it early, while we were asleep at the wheel here in Tennessee. So when everybody woke up, JAS was there to help guide us."

2. ✓ **Tying Tennessee to the national picture.** "Early on," a Tennessee fair courts leader reflected, "Justice at Stake helped set the national stage." Another advocate related that "JAS had its eyes on the long term, and made people focus on the retention even as the amendment issue was going on." According to Diane Dillani, "when our organization was very focused on Amendment 2, JAS was saying that it's really important to focus on the retention as well." In particular, JAS's presence at the Vanderbilt University Law School panel "helped people understand that JAS is a resource with an eye on the national picture." Though one campaign leader thought that JAS could have gone further in illustrating the emerging national trends concerning outside spending, attacks on the courts, and successful campaign strategies, most advocates agreed that JAS provided "really useful" and "necessary" background information that helped prepare advocates for the road ahead. Diane also noted that JAS's perspective "helped frame every conversation going forward, especially when we were thinking about media and our message."

3. ✓ **Sharing steps to success.** Relaying lessons learned from involvement in states such as Florida and Iowa, JAS helped key strategists understand the mechanics of those campaigns. "Much of the strategy and messaging," one campaign leader remarked, "came from conversations between Debra

[Erenberg] and Margaret Behm." From the beginning, JAS also advised supporters of the justices to hire an experienced campaign manager.

4. ✓✗ **Convening and engaging strategic partners.** JAS assumed a strategic, measured leadership position early on when it came to convening organizations with a stake in the retention elections – the ACS forum that JAS participated in at Vanderbilt University Law School was perhaps the single most determinative convening of the election cycle, bringing together "a community" that was concerned about fair courts issues. Yet it took a bit longer for JAS to get other constituencies, such as the legal community, involved. In the mind of one strategist, JAS could have "helped these groups [of lawyers] get behind good people." Others felt that "stronger partnerships" with more "unusual alliances not connected with the legal community" that nonetheless have huge distribution lists – such as domestic violence groups, which have a strong relationship to the courts – were missed opportunities. With so many people who had an indirect dependency on the courts, events like polling briefings could have forged new connections, with JAS serving as a "validator for why people need to get their act together."

"My conversation with Debra [Erenberg, JAS's State Affairs Director] at the polling briefing was priceless – especially right as we were pulling the team together and thinking about moving forward."

5. ✓✗ **Setting the stage with early polling data.** JAS stepped in with polls early on, when others were not yet engaged. As Steve Smith remembered, "JAS's poll was the first I saw; they were the only people who had done anything in Tennessee around these issues." Such data provided a constellation of voter values and preferences from which to develop an effective message. As Diane Dillani shared, "JAS's polling created a capacity that our organization never had, a capacity to understand just how important it was to educate our citizens about why we have merit selection. The polling that JAS shared showed us where we were, and JAS's very clear data and summaries got our board to vote 'Yes' to putting time into educating people about this issue. JAS's work helped our leadership understand the importance of educating people about retention."

"JAS's poll was the first I saw; they were the only people who had done anything in Tennessee around these issues."

"JAS's polling created a capacity that our organization never had, a capacity to understand just how important it was to educate our citizens about why we have merit selection. The polling that JAS shared showed us where we were, and JAS's very clear data and summaries got our board to vote 'Yes' to putting time into educating people about this issue."

However, some parties have stated that with additional resources JAS could have helped arrange for better polling (one senior campaign adviser noted that JAS's first poll "had limitations," in that "some of the questions could have been asked in a way to gather more information"), or more polling briefings, which would have been immensely important during the early "denial phase" of the campaign.

6. ✓**Creating the narrative**. “What was really so helpful – I cannot even begin to say how helpful it was – was the universe of information JAS makes available through its publications and website,” related Alistair Newbern. “Every time I gave a talk that featured JAS’s work on sitting judges and their perspective on money, I had ten people asking me for the data and report. A lot of people said to me ‘Now I have a way to talk about this.’” Advocates relied on JAS’s *Speak to American Values* publication to craft talking points, which were crucial to selling the fair courts message at events sponsored by lawyer groups, including the Tennessee Women Lawyers Association and the Black Lawyers Association. A senior organizer for the justices’ campaigns related that “Out of all the research we did,” JAS’s research on word choice – as reflected in *Speak to American Values* – “may have been the best research we used, and it wasn’t even ours.” And as Diane DiIanni from the Tennessee League of Women Voters reflected:

   > We definitely considered and discussed things that JAS had said to us about using words that clearly demonstrated what we wanted to communicate. I used JAS’s research and publications in a big presentation I made to the League’s board….They were easy to use, full of charts, very user-friendly, and very polished. JAS was a shot in the arm in terms of polling research and how to shape our education efforts.

   Alistair Newbern echoed these accolades, saying “Your message was being used on all fronts.”

“Every time I gave a talk that featured JAS’s work on sitting judges and their perspective on money, I had ten people asking me for the data and report. A lot of people said to me ‘Now I have a way to talk about this.’”

7. ✓**Tracking, reporting on, and contextualizing spending.** Throughout the course of the campaign, JAS monitored the campaign spending on both sides, reported on it, and added in-state, intrastate (by connecting the spending trends in Tennessee with those in North Carolina), and national frameworks that helped flesh out the political motivations behind them, with an emphasis on the prevalence and significance of outside money. Such context helped flesh out what one advocate called a “key connection – that a vote to replace was the same as a vote for dark money.”

8. ✓**Selling the narrative**. Through media releases and other efforts, JAS helped push an engaging narrative into the ears of national reporters who were not yet plugged in to Tennessee, helping to sink Ramsey’s attempts at hiding his money and influence. “I give JAS appropriate credit for providing the foundational information that gave the justices the benefit of the doubt in every outlet of the media,” said a senior member of the justices’ campaign.

   JAS’s research generated data that helped fuel the local Tennessee press, as local reporters likely did not have the time to research such stories. By design, JAS’s immediate efforts likely did not reach voters directly; one strategist remarked that “I would be surprised if 2% of the voters could say ‘I saw something from some organization in D.C.” This is a positive assessment, for while JAS “definitely did drive the press,” it did so without supplanting local advocates who were better positioned to lead the conversation.

9. ✓**Providing key research and analysis.** For one of the most active leaders of the pro-retention effort, JASC’s internal research into Ramsey’s strategy document was “really helpful,” as it helped to

seamlessly point out Ramsey's misrepresentations, which in turn fueled a media frenzy. "I can't think of anything else that could have been more helpful," Suzanne Keith remarked.

10. ✔ **Serving as the go-to resource for public education**. Providing early polling data and battle-born messaging insights, JAS spurred organizations to reach new audiences and levels of engagement. However, some wondered if there was a way for JAS to have provided more public education leadership by pushing groups such as the TBA to educate more of its members.

11. ✔ **Finishing the narrative through exit polling**. JAS's exit polling helped provide data to local advocates about what did and did not work, informing not only the fair courts community in Tennessee, but as one campaign leader remarked "I guarantee you, it will have an impact on future judicial retention races around the country."

12. ✔✘ **Knowing the role that JAS should – or could – play**. JAS could not be and was never meant to be the face of the pro-retention campaign. As one campaign leader made clear, "for a Washington organization to take a bigger profile – or to have been too far out in organizational efforts – I think it could have backfired quicker than not." Thus, JAS did "a fabulous job of walking a tightrope," a job attributable to "a mature, seasoned political organization that knows when and where to be heard, and where to play and to not play; the key being not play."

    But as a handful of advocates critiqued, this measured approach does not mean JAS could not also strategically nudge itself closer to its desired outcome. While some related that JAS was "very clear" about what JAS "could and couldn't do," one campaign advocate advised that "Justice at Stake needs to figure out how far they can go, so that by the time this stuff lights up, they can tell us what they can and can't do. That's where JAS could really be helpful – figure it out, so that groups can mobilize." Perhaps confused by the limitations imposed on JAS by its 501(c)(3)status, one campaign leader felt that JAS could have supplied more "guidance on how to win," and could have done a better job of explaining that "there is a science and a math that we should probably pay attention to." Clearly defining how "far" JAS, or its sister organization, JASC, can go would also help it stand out to funders amidst other organizations working in the fair courts space, the campaign leader said.

13. **Outline the legal guardrails.** As advocates on the ground in Tennessee related, folks involved in judicial campaigns – from the justices to the consultants – are often not familiar with what different people and organizations can and cannot do under the law. Victoria McCullough recalled, "I was so bogged down for the first 60 days with legal challenges around fundraising. For several weeks people were going in circles about who could help who, who couldn't talk to who, what entity their talents would be best used." Margaret Behm, a lawyer herself, spoke of legal complications that plagued social media efforts. With better resources devoted to analyzing the legal landscape, JAS, or another entity such as Alliance for Justice, could inform its strategic partners of the "do's and don'ts" prescribed by state and federal law, and in the words of one organizer, "tell us how far we can go."

14. **Fully engage through a 501(c)(4).** As one senior campaign strategist made clear, "someone needs to set up a national presence that's willing to go in and fight the campaign stuff. I'm critical of JAS because someone needs to do it, and it could be them." With a fully-funded (c)(4) advocacy organization, JAS could have been more strategic in its targeting and more aggressive in its communications. For example, it could have steered more attention to the political motivations

behind the attacks on the justices, created a "Retain the Justices" webpage – which could have devoted a section to combing through the Ramsey's misrepresentations – authored ghost-written Op-Ed pieces for on-the-ground state allies, and produced multimedia products showing people how to vote, as Ramsey did.

15. **Faster, more responsive communications.** Given the FEC's new disclosure requirements, JAS was able to learn best practices and "work out the kinks" during the Tennessee retention cycle. But with additional resources, JAS would be able to more quickly analyze this real-time information, instead of being mostly confined to "just getting the numbers out there." More resources would mean more of a storyline context for these numbers, more productive relationships with local and national media, and an enhanced ability to connect national media with JAS's local contacts.

V. Playbook for Winning a Retention Election

1. **Start early.** As Victoria McCullough, Chief Strategist for Keep Tennessee Courts Fair, remarked, "No matter what, start early. In this political climate, it's safe to assume an attack is coming."

2. **Hire an experienced campaign manager.** For judges and fair courts supporters not accustomed to operating in a politically charged campaign environment, someone who knows the ropes can be a life-saver.

3. **Reach out to veteran fair courts advocates.** As Suzanne Keith spelled out, "don't reinvent the wheel!" Reach out to other fair courts advocates – most importantly, Justice at Stake – for guidance. Use this opportunity to learn how they approached similar situations, what their strategic plan was, and how they achieved success.

4. **Flesh out the legal restrictions that permit or limit involvement.** As Victoria McCullough highlighted: "Our biggest challenge was coordinating with the three of them; they can't legally endorse each other; they can't technically pool funding." Given these restrictions, advocates should determine where – and in what organizational form – they can be the most effective.

5. **Organize a group of bipartisan advocates who care about the issue and are politically savvy**. What really "sealed the deal" in Tennessee was organization: galvanizing people and getting an on-the-ground movement, especially for judges, who are not like typical politicians. Retention advocates treated the legal community like a staff – from field work to event planning to fundraising. JAS assisted these efforts by facilitating the American Constitution Society panel on Amendment 2 at Vanderbilt University Law School, which served as ground zero for organizing around the then-under-the-radar retention elections. Perhaps most important is finding a credible spokesperson from the other side of the aisle who is willing to step up and speak out early as Lew Connor did.

6. **Create 501(c)(3) and 501(c)(4)** organizations to provide public education and advocacy services, respectively.

7. **Poll early and often**. Polling is essential for establishing a baseline for success. But even more importantly, early polling captures the electorate's values and concerns, which go on to shape the messaging of the campaign. Because judicial campaigns are often run by attorneys, polling can also help reveal the non-legal, political reality of a campaign. Knowing the importance of early polling, JAS conducted a poll in January 2014 that captured voter preferences and values – such as preferences for the messaging language "fair and impartial" – along with essential voter opinions on the Tennessee Supreme Court.

8. **Own the media narrative through effective messaging.** As Steve Smith related, "whoever controls the debate of the campaign, wins the campaign." Get the upper hand by identifying early the best messages and the best messengers. Barring particular, anecdotal evidence to the contrary, Supreme Court justices tend to attract a natural, positive – and yet fragile – deference from voters. Guard this carefully. As the Tennessee situation illustrated, retention advocates need to own messaging around fundamental fairness. "People like fairness," Suzanne Keith underscored, so make an early claim to "fair and impartial," "justice is not for sale," as well as the need to keep politics and ideology out of the courts. Other messaging that proves effective is talking about "power grabs" by politicians, and "outside interests" that are trying to "buy the courts." But beyond that, develop tailored messages based on the facts on the ground.

   Finally, connect with people on the ground who already have relationships with local reporters, or cultivate those relationships early on. Then, make it easy for the media. Do the work that it does not have time to do. Develop creative hooks – such as large amounts of spending or provocative polling data. Then pick up the phone and pitch stories.

9. **Fundraise early**. Early fundraising – particularly the ability to show a war chest in the first reporting period - may help stave off organized opposition.

10. **Campaign like politicians.** "The most critical thing that helped us retain these judges," one senior campaign operative recalled, "was having the voters see them."

11. **Have judges hit the road to educate the public.** According to one leader in the retention effort, "by the time public education is through, it becomes clear that judges need to be retained." In this fashion, public education in Tennessee got voters "nine-tenths of the way to advocacy," saying everything but "'you ought to retain these justices.'" A political consultant related that public education should be an ongoing effort: "If you've got time, slowly build peoples' knowledge of the court so their positive feelings will last longer." Alistair Newbern from the American Constitution Society Nashville Chapter echoed the sentiment that successful public education efforts should take place early and often.

    However, a successful public education campaign also focuses not just on fair courts issues, but on the justices themselves. As Suzanne Keith put it, it is critical to have judges be present in the community, be in making appearances, talking about why they pursued a position on the bench, or simply making the social pages – as opposed to the headlines – of local newspapers.

12. **Win in the media.** "If you can," Victoria McCullough advised, "win every day in the media." Aside from reserving ad time early, be the first to make contact with media outlets, pursue coverage for events, get candidates local coverage in small town-newspapers,

> *"Win every day in the media."*

find a source to write an Op-Ed explaining retention and why it matters. “If there’s anything you can do in the beginning to insert yourself in the conversation in local papers,” such as editorials, Steve Smith recalled, “that’s huge.” It’s a win for the media, too – they get to cover areas of government they are not familiar with.

VI. Epilogue

If you pick the fight and you don’t win, what can you say? – Senior-level Advocate

Two days after the retention elections, Sen. Brian Kelsey introduced legislation to implement a new system of judicial appointments: the governor would appoint all appellate judges, subject to confirmation by, first, a 14-member judicial confirmation committee comprised of seven members from each house, and then, by both houses in full. Next, Tennesseans would vote to retain or replace these newly appointed judges on the next statewide August election ballot, enabling them to weigh in on the selection process more quickly than before.

Not long thereafter, Chief Justice Gary Wade and Justice Sharon Lee sat down for breakfast with Lt. Gov. Ramsey. After congratulating the justices on a successful retention campaign, the topic turned to the next attorney general.

A few short weeks later, the Tennessee Supreme Court replaced Attorney General Bob Cooper, a Democrat, with Herbert Slatery III, Gov. Haslam’s chief legal counsel, a Republican. Many fair courts advocates felt betrayed, and remarked that the unexpected appointment was “very, very difficult” to process, and especially tough on those leaders who helped mobilize constituencies across the state.

On November 4th, 2014, Tennessee voters approved Amendment 2 by a roughly 20-point margin, thus empowering the governor to appoint appellate judges subject to confirmation by the general assembly. Then, on November 7th, Gov. Haslam issued an executive order establishing the Governor’s Council for Judicial Appointments, an 11-member body that is charged with evaluating and recommending three candidates for each vacancy on Tennessee’s trial and appellate courts. According to the order, every member of the council is to be appointed by the governor, with three members each from the western, central and eastern parts of the state, and two at-large members.[15] Once a set of candidates is sent to the governor, the governor can choose to appoint one of these three, or he or she can reject all three and ask for a second slate of candidates.

The new “modified federal” system created under Gov. Haslam not only consolidated appointment power to the governor and the governor alone, but left the future of Tennessee’s merit selection system at the mercy of the state’s political winds, perhaps ensuring that the record-breaking retention elections of 2014 would be but one chapter in a much longer Tennessee story.

VII. Appendix

(Please see attached.)

1. Lt. Gov. Ron Ramsey's PowerPoint Presentation.
2. Legal Memo by Justice at Stake Campaign Regarding Lt. Gov. Ron Ramsey's Attacks on Attorney General Bob Cooper and the Tennessee Supreme Court.
3. Justice at Stake Press Release on Tennessee Election Night Poll.

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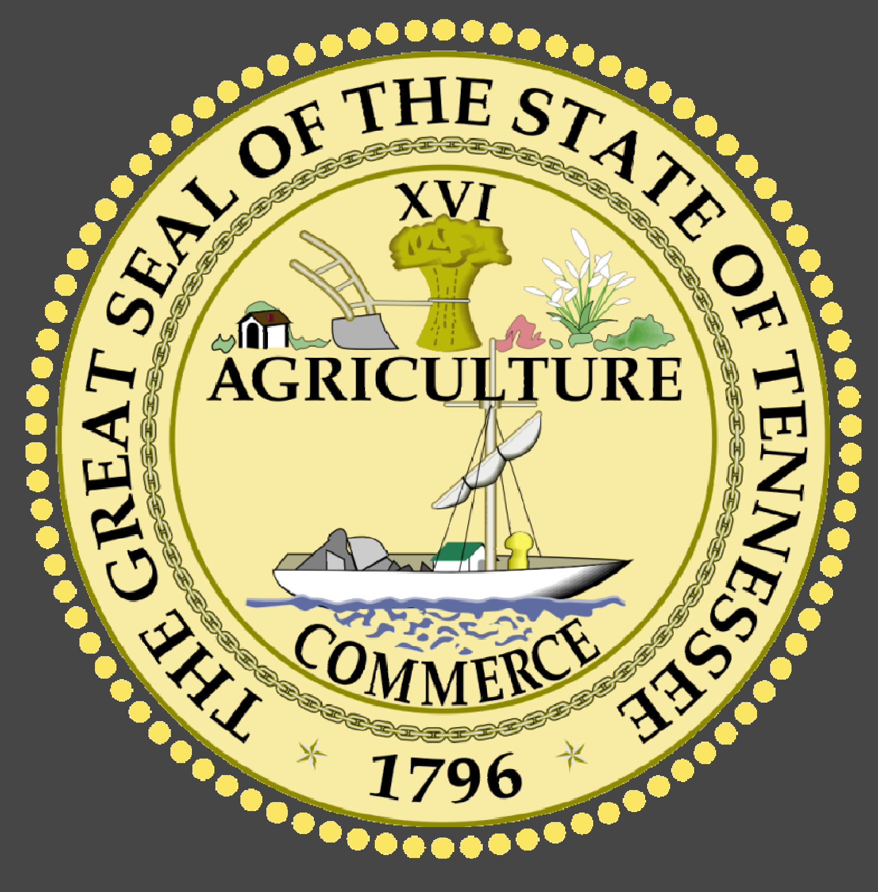
[1] 1870 to 1971. The original constitution of Tennessee mandated that the justices be elected by the General Assembly. They would then hold lifetime tenures. The Constitution was later amended to provide for general elections, and to limit the justices' terms to eight years.
[2] Chris Butler, *TN group questions whether Supreme Court justices reflect state values*, TENNESSEE WATCHDOG, June 24, 2014, http://watchdog.org/156094/tennessee-supreme-court-3/.
[3] The Tennessee Plan was upheld in 1973 in *Higgins v. Dunn*, where the Tennessee Supreme Court found that the Tennessee Constitution did not specify what type of election the General Assembly had to implement.
[4] Frank Daniels III, *Retention battles are really just starting*, THE TENNESSEAN, Aug. 8, 2014, http://www.tennessean.com/story/opinion/columnists/frank-daniels/2014/08/08/retention-battles-really-just-starting/13800615/.
[5] Phil Williams, *Plan Outlines Attack on Supreme Court Justices*, NEWS CHANNEL 5, May 5, 2014, http://www.newschannel5.com/story/25434821/planoutlines-attack-on-supreme-court-justices.
[6] *See* Rob Robertson, *Koch brothers direct ire, money against Tennessee judges*, MEMPHIS BUSINESS JOURNAL, July 24, 2014, http://www.bizjournals.com/memphis/blog/2014/07/koch-bothers-direct-ire-money-against-tennessee.html.
[7] Sher, *supra* note 1.
[8] Andy Sher, *Roy Herron slams justices for dropping Bob Cooper*, CHATTANOOGA TIMES FREE PRESS, Sept. 21, 2014, http://www.timesfreepress.com/news/2014/sep/21/herron-slams-justices-for-dropping-bob-cooper/?politics.
[9] Chris Butler, *Prominent journalist must not have anything better to do than attack Tennessee Watchdog*, TENNESSEE WATCHDOG, July 31, 2014, http://watchdog.org/162609/tennessee-supreme-court-10/.
[10] *See* http://www.napierlooby.com/.
[11] Butler, *supra* note 10.
[12] Chris Butler, *Left-wing Soros groups to help Tennessee justices up for election*, TENNESSEE WATCHDOG, June 13, 2014, http://watchdog.org/150029/george-soros/.
[13] Daniels, *supra* note 5.
[14] Andy Kroll, *Is Your Judge for Sale?*, MOTHER JONES, November/December, http://www.motherjones.com/politics/2014/10/judicial-elections-citizens-united-karl-rove.
[15] *Governor Establishes Council for Judicial Appointments*, TNCOURTS.GOV, Nov. 7, 2014, http://www.tsc.state.tn.us/news/2014/11/07/governor-establishes-council-judicial-appointments.



Tennessee Supreme Court

Attorney General Bob Cooper

Bob Cooper : Enemy of Job Creators

- Led or joined numerous multistate lawsuits costing job creators billions in settlements
- Example settlements
  - Toyota - $29 million
  - Wyeth - $257.4 million
  - National Mortgage Settlement - $1.5 billion
  - Google - $7 million
  - Lender Processing Services - $120 million
  - Abbott Laboratories - $100 million
  - Janssen Pharmaceuticals - $181 million

Selection of the Attorney General

Selection of the Attorney General

- Tennessee Supreme Court Selects Attorney General
- Tennessee Constitution Article VI Section 5:
  - *An attorney general and reporter for the state, shall be appointed by the judges of the Supreme Court and shall hold his office for a term of eight years.*
- Eight Year Term – Expires August 31, 2014
- Simple Majority Selects Attorney General

Tennessee Supreme Court

Supreme Court Justices

- Chief Justice Gary Wade (Bredesen)
- Justice Connie Clark (Bredesen)
- Justice Janice Holder (Sundquist – Retiring)
  - Replaced by Holly Kirby as of Sept 1, 2014
- Justice William Koch (Bredesen - Retiring)
- Justice Sharon Lee (Bredesen)

Tennessee's Missouri Plan

Supreme Court Retention Process

- Tennessee fills Supreme Court Vacancies through Gubernatorial Appointment
- Serve Eight Year Term
- Justices up for a retention vote in August 2014
  - Shall ___________ be retained or replaced in office as a Judge of the ________ (court)________?
    ___RETAIN
    ___REPLACE
  - Ballot language codified in TCA §17-4-115(b)(1)
  - Retain/Replace Only – Not a contested election unless given a negative recommendation from the Judicial Performance Evaluation Commission

Tennessee Supreme Court: Soft on Crime

Sharon Lee

- Leonard Edward Smith killed two people in 1984
- Sharon Lee authored the opinion that vacated this double murderer's death sentence because of questions "whether Smith was intellectually disabled" and received a competent defense

Meet Leonard Edward Smith

Sharon Lee authored the opinion that let this double murderer off death row.

Leonard Edward Smith v. State of Tennessee

Connie Clark

- Voted to let Arthur Copeland, convicted murderer, out of death row and back in to society
- In and out of jail repeatedly since he was freed, Copeland was arrested for allegedly raping his girlfriend and "stuck the barrel of a pistol in the woman's mouth"

Tennessee Death Penalty (or lack thereof)

- Tennessee has only executed 6 inmates since 1976 – and none since 2009
- The Supreme Court sets execution dates for offenders after required direct appeals are complete upon petition of the Attorney General
- There are currently 76 inmates on death row awaiting execution
- Supreme Court has set 11 execution dates for 2014
- The first has already been vacated
  - Nickolus Johnson – on death row for nearly 7 years for killing a police officer in 2004

Victims' Photographs Used In Cases

- The state Supreme Court has taken a dim view of allowing victims' photographs to be introduced as evidence because it could jeopardize the integrity of the trials
- "Over the years, the Court has consistently cautioned the State against the introduction of such photographs because they typically lack relevance to the issues on trial and because of their potential to unnecessarily arouse the sympathy of the jury," Chief Justice Gary R. Wade wrote in a 2013 opinion.

Tennessee Supreme Court: Business Decisions

Becker v. Ford Motor Company

- Michael Becker and son Phillip Becker were injured in an accident in a Ford F-150
- Michael Becker was the owner of the truck; Phillip Becker was driving
- Michael Becker sued Ford and later, after expiration of the statute of limitations, filed an amended complaint to add his son to the complaint as a defendant
- Ford objected, saying the statute of limitations had run
- Supreme Court ruled that the plaintiff can add a defendant after a lawsuit was filed and after the statute of limitations had run even if the defendant was known to the plaintiff when the complaint was originally filed

Cracker Barrel v. Richard Epperson

- Opinion Authored by Connie Clark
- Lawsuit originated over Epperson’s desire to expand property adjacent to a Cracker Barrel violating restrictive covenants relative to vehicular easements.
- Cracker Barrel won the suit, but the Supreme Court ruled that the contractual language “all costs and expenses of any suit or proceeding” was not enough for Plaintiff to collect attorney fees.
- Direct assault on “loser pays” contractual language.

Gary Gosset v. Tractor Supply Company

- A former employee alleged retaliatory discharge after he was dismissed from the company due to duplication of work product and other performance issues, including insubordination.
- The Supreme Court eroded Tennessee's right to work case law by setting aside legal precedent that required that "reporting the alleged illegal activity is an essential element of a cause of action for retaliatory discharge"

Dewald v. HCA of Tennessee

- HCA was sued by a patient due to alleged malpractice by a non-employee physician.
- Plaintiff argued that hospitals may be held vicariously liable for the negligence of independent contractor physicians.
- Supreme Court refused to affirm HCA's summary judgment motion, and set out the possibility to hold the hospital accountable for the actions of others outside of their direct control.

Lind v. Beaman Dodge Chrysler Jeep

- Supreme Court allowed an individual to sue the dealer who sold them a truck that allegedly "self-shifted" into reverse and injured the driver.
- The statute of limitations had expired, but the Court allowed the suit to continue because the manufacturer had become insolvent and thus began the Plaintiff's ability to pursue a strict liability claim.

Hill v. NHC Nashville

- The Supreme Court found that, despite being clearly stated and agreed to in the admissions agreement, a contract provision requiring disputes be resolved in arbitration to be unconscionable.
- One of the administrators of the estate that was suing signed the agreement directly beneath the arbitration clause.

Myers v. NHC McMinnville

- Jury trial resulted in a $29.8 million punitive damage judgment against NHC, which the trial judge reduced to $163,000.
- Court of Appeals reversed the trial judge's decision to reduce the punitive damages and remanded the case back to the trial court for further proceedings, despite the trial judge stating he found no overt recklessness on the part of NHC.
- Supreme Court declined to hear the case.

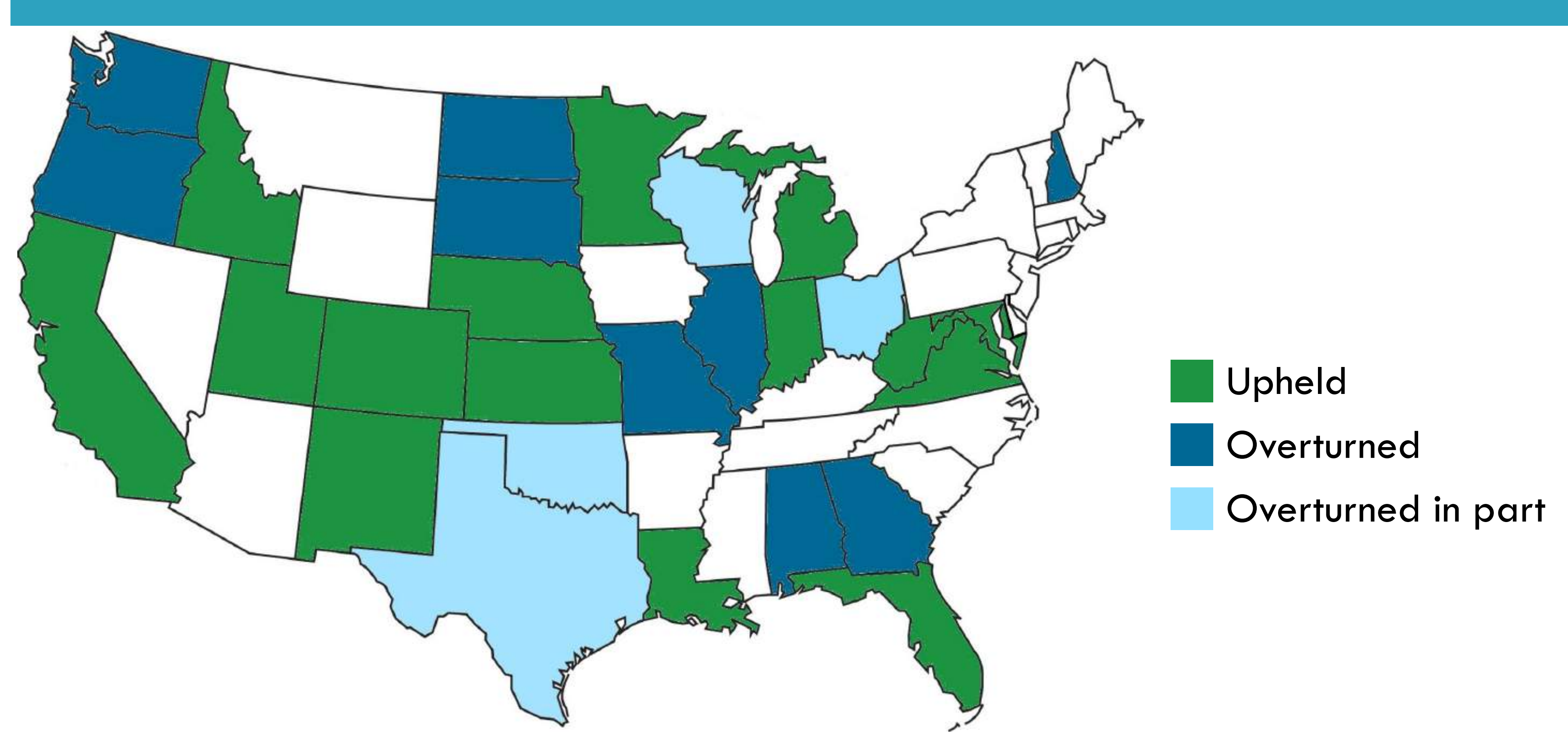
Sarah White v. Target Corp.

- Female customer sued target after being told a smoked glass dome above the dressing room that she tried on clothes contained a security camera when it in fact did not.
- Plaintiff sought $22 million in damages from Target for emotion distress, despite there not actually being a camera.
- Trial court granted Target's summary judgment motion, but the Tennessee Court of Appeals reversed that decision and allowed the suit to proceed.

Tort Reform finished? Not so fast.
Coming to Tennessee Supreme Court

- Sadowski v. Kheiv; Shelby County Circuit Court
- Jury awarded plaintiffs $2.7 million in non-economic damages from car accident
- Media Coverage: "Case Pits Survivor Against His Own Insurer Over Uninsured Motorist Claim; **Weakened State Law Limits Recovery for Wife's Painful, Lingering Death**"
- Plaintiff's Attorney: "In other states, high courts have **struck down as unconstitutional** attempts to take such decisions away from juries. This case could provide an opportunity to **present the issue to the Tennessee Supreme Court.**"

Tort Reform Tossed? It's Happened Before



Tort Reform Tossed? It's Happened Before

- Alabama: Cap represents impermissible burden on the right to trial
- Georgia: Cap violates a plaintiff's right to trial by jury
- Illinois: Cap violates separation of powers
- New Hampshire: Cap violates state equal protection clause
- Oklahoma: Cap overturned as a "special law"
- Ohio: Cap overturned as due process violation
- South Dakota: Cap violated the open courts doctrine by limiting liability
- Texas: Cap ruled "unreasonable and arbitrary"

Involvement in Performance Evaluations

Judicial Performance Evaluation Commission

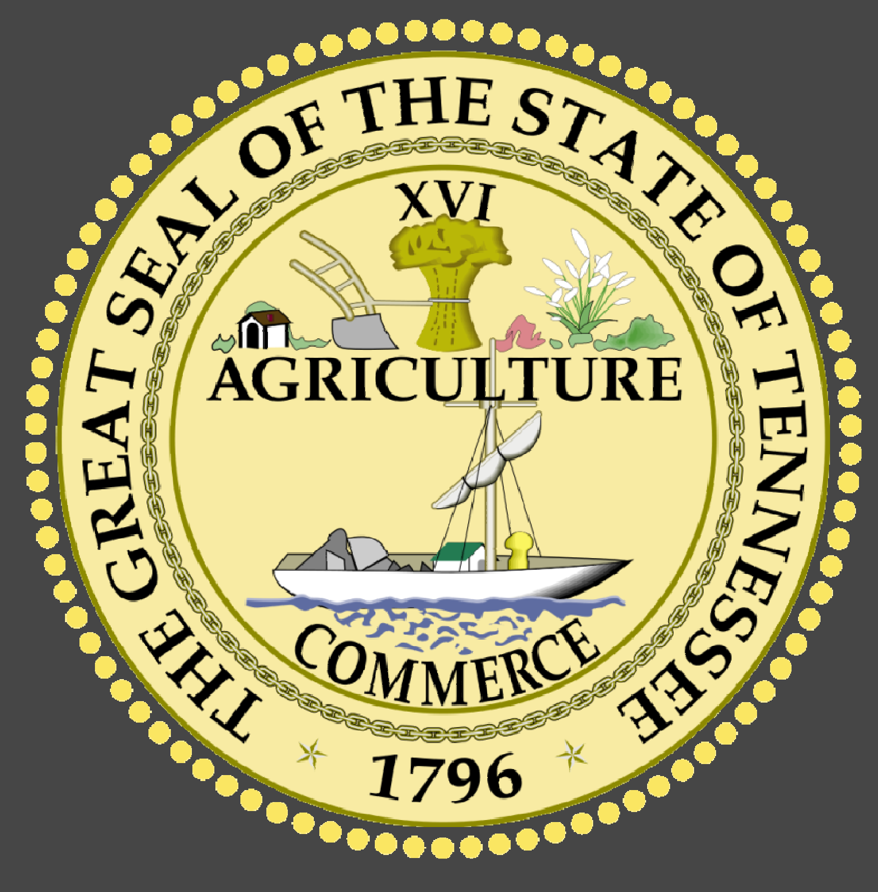
- Prior to standing for a retention election, judges are evaluated by the Judicial Performance Evaluation Commission (“JPEC”)
- Members of JPEC are appointed by both Speakers
- JPEC recommends either retention or not to retain, at which point judges must run in a contested election – which has never happened

Judge Wade Interfering in JPEC's Duties

- After three judges received preliminary negative recommendations, "Chief Justice Gary Wade of Sevierville said in an interview that he believes all three judges receiving negative recommendations from the Judicial Performance Evaluation Commission deserve new terms."
- After Wade's defense of the judges, the article continued to say that "The negative recommendations have raised questions of partisanship and diversity."
- Wade later had to clarify his statements and say he was "merely voicing [his] personal opinion based on personal knowledge of the judges involved."

Partly Cloudy-Sunshine Forecast for the Judiciary

- On February 18th, a JPEC meeting was called to discuss the final report on the judges who received preliminary negative retention recommendations.
- A staff member of the Lt. Governor attempted to attend the meeting and was asked to leave, despite the Commission continuing to conduct business.
- Sunshine laws should apply to judicial commissions so they do not decide who Tennessee's judges are in private.



Tennessee Supreme Court

TO: Debra Erenberg, Director of State Affairs
Justice at Stake
FROM: Eric Johnson
DATE: April 20, 2015

RE: Research on Tennessee Lt. Gov. Ron Ramsey's Planned Attack on the Judiciary

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Attacks on Attorney General Cooper as an "Enemy of Job Creators"

- 5 of the 7 cases involved parties that pleaded guilty to criminal violations stemming from the same conduct for which AG Cooper sought civil penalties
- Each of the 7 cases was bipartisan and multistate
- The pharmaceutical cases were brought after drug companies marketed drugs for unapproved purposes, resulting in the submission of false claims to the state Medicaid program and costing Tennessee taxpayers
- The settlements were used in part to offset the costs of bringing the lawsuits and protecting Tennessee citizens

Lt. Gov. Ramsey's first point of attack on the Supreme Court is based on the court's role in selecting the Attorney General (AG). The slide deck describes AG Bob Cooper as an "enemy of job creators." As evidence, the slide deck lists AG Cooper's participation in 7 multistate lawsuits: Toyota, Wyeth, the National Mortgage Settlement, Google, Lender Processing Services, Abbott Laboratories, and Janssen Pharmaceuticals. Each of those settlements is described in turn.

Toyota Settlement

- Toyota has admitted to misleading the public and regulators regarding safety issues, which have been implicated in as many as 89 deaths
- The multistate litigation was bipartisan and brought by 12 Republicans and 17 Democrats

Between 2009 and 2010, Toyota recalled over 6 million vehicles to address safety issues related to unintended acceleration.[1] In early 2010, the attorneys general of 29 states and 1 territory formed a working group to investigate Toyota's business practices.[2] Twelve of those attorneys general were Republicans, while 17 were Democrats.[3] Toyota ultimately paid $29

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[1] Complaint for Injunctive and Other Relief 5, *available at* http://www.tn.gov/attorneygeneral/cases/toyota/toyotacomplaint.pdf.

[2] Agreed Final Judgment 2, 6-7. The 29 states were: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin. The one territory was American Samoa.

[3] The 12 Republicans were: Troy King, AL; John Suthers, CO; Bill McCollum, FL; James Caldwell, LA; Mike Cox, MI; Jon Bruning, NE; Tom Corbett, PA; Henry McMaster, SC; Greg Abbott, TX; Ken Cuccinelli, VA; Rob McKenna, WA; J.B. van Hollen, WI.

The 17 Democrats were: Terry Goddard, AZ; Dustin McDaniel, AR; Richard Blumenthal, CT; Lisa Madigan, IL; Tom Miller, IA; Stephen Six, KS; Douglas Gansler, MD; Lori Swanson, MN; Jim Hood, MS; Catherine Masto, NV; Paula Dow, NJ; Gary King, NM; Roy Cooper, NC; Richard Cordray, OH; John Kroger, OR; Patrick Lynch, RI; Robert Cooper, TN.

million to the attorneys general to settle the lawsuit, and also agreed to reimburse vehicle owners for reasonable out-of-pocket expenses related to the recalls. The State of Tennessee received $680,484.77 of the $29 million settlement.[4]

In March of 2014, Toyota and the U.S. Department of Justice (DOJ) agreed on a deferred prosecution agreement requiring Toyota to pay a $1.2 billion fine. The charges against Toyota stemmed from the same conduct that the state attorneys general alleged in the multistate lawsuit resulting in the $29 million fine. In its DOJ agreement, Toyota admitted to misleading the American public "by making deceptive statements about the safety problems that caused its vehicles to speed up uncontrollably," and also to intentionally concealing from federal regulators information relating to unintended acceleration.[5] From 2000-2010, unintended acceleration in Toyota vehicles was linked to as many as 89 deaths and 57 injuries.[6]

Wyeth Settlement

- Wyeth pleaded guilty to criminal violations of the Food, Drug, and Cosmetic Act
- The multistate litigation effort was bipartisan, and of the $490.9 million settlement, only $768,890 went to Tennessee
- Part of the recovered amount was reimbursement for state Medicaid payments for non-approved uses of Rapamune

In 1999, Wyeth received FDA approval to market the drug Rapamune for use in kidney transplant patients. Wyeth subsequently trained and incentivized its sales force to market Rapamune for unapproved (or "off-label") uses. The Department of Justice brought both civil and criminal claims against Wyeth for violating the federal Food, Drug, and Cosmetic Act. Wyeth pleaded guilty to the criminal charges and agreed to pay $490.9 million to settle both the criminal and civil claims.[7]

Approximately $27 million of the $257.4 million civil settlement went to the states, including Tennessee, that joined the bipartisan civil action.[8] Tennessee's share of the settlement was $768,890.[9] The amounts that Wyeth

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[4] Agreed Final Judgment 16.

[5] *Toyota Reaches $1.2 Billion Settlement to End Probe of Accelerator Problems*, Washington Post, Mar. 19, 2014, http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html.

[6] *Toyota "Unintended Acceleration" Has Killed 89*, CBS News, May 25, 2010, http://www.cbsnews.com/news/toyota-unintended-acceleration-has-killed-89/.

[7] *Wyeth Pharmaceuticals Agrees to Pay $490.9 million for Marketing the Prescription Drug Rapamune for Unapproved Uses*, http://www.justice.gov/opa/pr/2013/July/13-civ-860.html.

[8] Both Indiana (Republican AG Gregory Zoeller) and Tennessee were among the many states involved in the settlement agreement.

[9] *Tennessee Reaches Settlement with Wyeth over Allegations of Off Label Marketing of Kidney Transplant Drug*, http://www.tn.gov/attorneygeneral/press/2013/pr13-18.html

paid to the states were largely compensation for state Medicaid payments for unapproved uses of Rapamune.[10] Thus, Tennessee's participation in the lawsuit was in part to recover amounts already paid out by Tennessee taxpayers due to Wyeth's improper Medicaid claims.

National Mortgage Settlement

- It was widely reported that mortgage servicers had violated laws regarding their lending and foreclosure practices
- The National Mortgage Settlement was a bipartisan, state-federal effort joined by 49 state attorneys general

After the nationwide crash in housing prices, many of the nation's largest mortgage servicers allegedly began improperly foreclosing on homeowners. Thousands of homeowners were reportedly victims of "robo-signing," where mortgage servicer employees forged the signatures of servicer officials in order to prepare documents necessary for foreclosure.[11] Instances of robo-signing and other servicer fraud and misconduct were widely reported in the media.[12] The federal government and 49 attorneys general filed a complaint alleging myriad violations of state and federal consumer protection laws. Rather than contest the allegations, the 5 largest servicing companies settled for $25 billion. The settlement provides relief to homeowners wrongfully foreclosed upon and also to homeowners struggling to make their mortgage payments.[13]

Google

- It took Google less than 5 hours to earn $7 million in 2013, and approximately 5.5 minutes to earn the $133,528 it paid to Tennessee
- The bipartisan multistate action involved attorneys general from 38 states, including 16 Republicans[14] and 22 Democrats[15]

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[10] *See, e.g.*, State Settlement Agreement 2-6 (Settlement agreement between the State of Connecticut and Wyeth).

[11] *Mortgage Fraud Whistle-Blower Lynn Szymoniak Exposed Robosigning's Sins*, Bloomberg Businessweek, Sept. 12, 2013, http://www.businessweek.com/articles/2013-09-12/mortgage-fraud-whistle-blower-lynn-szymoniak-exposed-robosignings-sins; *"Robo-signing" of Mortgages Still a Problem*, CBS News, July 18, 2011, http://www.cbsnews.com/news/robo-signing-of-mortgages-still-a-problem/.

[12] *See, e.g.*, *The Next Housing Shock*, 60 Minutes, Apr. 3, 2011, http://www.cbsnews.com/videos/the-next-housing-shock/.

[13] *National Mortgage Settlement*, Tennessee Office of the Attorney General, http://www.tn.gov/attorneygeneral/cpro/mortgageservicing.html.

[14] Michael Geraghty, AK; Tom Horne, AZ; John Suthers, CO; Pam Bondi, FL; Derek Schmidt, KS; James Caldwell, LA; Bill Schuette, MI; Tim Fox, MT; Jon Bruning, NE; John Hoffman, NJ; Wayne Stenehjem, ND; Mike Dewine, OH; Scott Pruitt, OK; Alan Wilson, SC; Greg Abbott, TX; Ken Cuccinelli, VA.

[15] Dustin McDaniel, AR; Kamala Harris, CA; George Jepsen, CT; Joseph Biden, III, DE; David Louie, HI; Lisa Madigan, IL; Tom Miller, IA; Jack Conway, KY; Janet Mills, ME;

Between 2008 and 2010, Google Street View vehicles accidentally gathered WiFi data, including emails and Web page requests, from unsecured residential WiFi networks.[16] A bipartisan coalition of 38 attorneys general brought a lawsuit against Google seeking to have Google stop the unauthorized data collection. Google stopped the data collection and, among other remedies, paid a total of $7 million to be split among the 37 states. Tennessee's share of the settlement, $133,528, was in part a reimbursement of the costs incurred by the Attorney General's office in securing the settlement and preventing future privacy violations by Google.

Lender Processing Services

- LPS admitted to participating in criminal fraudulent practices related to the preparation of more than 1 million mortgage-related documents
- The suit was a bipartisan action brought by 46 states

Lender Processing Services (LPS) engaged in illegal "robo-signing" of documents for at least three years following the crash in housing prices.[17] In response, 46 state attorneys general filed a joint action against LPS. LPS admitted to its misconduct and agreed to pay $120 million, $2.3 million of which went to Tennessee. In February 2013, LPS admitted to "participat[ing] in a six-year scheme to prepare and file more than 1 million fraudulently signed and notarized mortgage-related documents."[18] Those fraudulent documents were subsequently used in wrongful property foreclosure actions.

Abbott Laboratories

- Abbott admitted to illegally marketing Depakote for unapproved uses and pleaded guilty to violations of federal criminal law
- The $100 million multistate settlement was bipartisan and joined by 45 attorneys general

From at least 1998 until at least 2006, Abbott Laboratories engaged in the illegal marketing and sale its drug Depakote for off-label uses. In 2012, Abbott pleaded guilty to criminal violations of federal law and agreed to pay a total of approximately $700 million to settle the criminal claims.

Douglas Gansler, MD; Martha Coakley, MA; Jim Hood, MI; Chris Koster, MO; Catherine Masto, NV; Gary King, NM; Eric Schneiderman, NY; Roy Cooper, NC; Ellen Rosenblum, OR; Peter Kilmartin, RI; Robert E. Cooper, TN; William Sorrell, VT; Bob Ferguson, WA.

[16] Assurance of Voluntary Compliance, *available at* http://www.tn.gov/attorneygeneral/cases/google/googleavc.pdf.

[17] Agreed Final Judgment, *available at* http://www.tn.gov/attorneygeneral/cases/lps/lpsafj.pdf.

[18] *Florida-Based Lender Processing Services Inc. to Pay $35 Million in Agreement to Resolve Criminal Fraud Violations Following Guilty Plea from Subsidiary CEO*, Feb. 15, 2013, http://www.justice.gov/opa/pr/2013/February/13-crm-206.html.

Additionally, Abbott settled numerous civil lawsuits brought by both the federal government and the states. The civil settlements totaled more than $800 million.[19] Tennessee, along with 44 other states, reached a $100 million settlement with Abbott Laboratories in a separate action stemming from Abbott's marketing of Depakote. Tennessee received $1.95 million of the settlement.[20]

Janssen Pharmaceuticals

- Janssen pleaded guilty to misbranding the antipsychotic Risperdal
- The multistate settlement was bipartisan and brought by 36 attorneys general

From 1999 until 2005, Janssen Pharmaceuticals engaged in illegal sales practices regarding the antipsychotic drug Risperdal. Although Risperdal was approved only to treat schizophrenia, Janssen marketed it to both the elderly and to children to treat a variety of symptoms that Risperdal was not approved to treat. Johnson & Johnson, Janssen's parent company, pleaded guilty to criminal violations regarding the marketing of Risperdal and agreed to settle both criminal and civil claims, which included allegations of Janssen paying kickbacks to doctors and submitting false claims to state Medicaid programs.[21] Tennessee joined a bipartisan, multistate action involving the attorneys general from 36 states. That action led to a $181 million settlement, of which Tennessee received approximately $4.5 million.

Misrepresentations of Tennessee Criminal Cases

Slides 11 and 12 of the slide deck portray Justices Lee and Clark as "soft on crime." For support, the slides describe two criminal appeals that the justices presided over—those of Leonard Edward Smith and Arthur Copeland. The slide deck mischaracterizes the Tennessee Supreme Court's ruling in each case to exaggerate the claim that the justices are soft on crime.

Leonard Edward Smith

- Decision to vacate death penalty was unanimous
- Smith received an unfair sentencing that was presided over by a potentially biased judge
- Fair trials are fundamental to the American system of justice, so the Supreme Court remanded for a new death penalty hearing

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[19] *Abbott Labs to Pay $1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote*, May 7, 2012, http://www.justice.gov/opa/pr/2012/May/12-civ-585.html.

[20] *Tennessee and Other Attorneys General Reach $100 Million Agreement with Abbott Laboratories*, May 7, 2012, http://www.tn.gov/attorneygeneral/press/2012/pr12-07.html.

[21] *Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations*, Nov. 4, 2013, http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html.

- Smith is currently serving life in prison

Leonard Edward Smith was convicted murdering John Pierce and Novella Webb and sentenced to death for the Webb murder. Smith appealed, and the Tennessee Supreme Court upheld both murder convictions and both life sentences. The Court unanimously vacated the death sentence for the Webb murder and remanded the case for a new sentencing decision. The Court did not declare Smith ineligible for the death sentence; rather, it held that the previous death sentence was tainted by the presence of a potentially biased judge and that the sentencing court had used the wrong legal standard.[22]

The judge who presided over Smith's sentencing, Judge Brown, had previously worked as a prosecutor, and in that capacity had prosecuted Smith on other charges at the same time that Smith was on trial for the Webb murder. A lower appeals court held that Smith's attorneys failed to provide effective assistance of counsel by not gathering evidence to support a recusal motion against Judge Brown. The Tennessee Supreme Court affirmed that decision, and also found that Judge Brown's failure to recuse himself deprived Smith of a fair sentencing trial. Because a trial before an impartial judge is fundamental to the American system of law, the Court found that "the potential injury to the judicial process due to the appearance of impropriety and unfair lack of impartiality by a judge imposing a death sentence is too great to allow the sentence of death to stand."[23]

The Supreme Court's decision did not set Smith free, and in fact did not even vacate his life sentences. Smith's case was remanded for a new sentencing decision before an impartial judge. However, after the ruling Smith reached a deal with prosecutors to accept the life sentences in exchange for prosecutors not seeking the death penalty.[24] Smith is currently serving life in prison.

Arthur Copeland

- The Court's decision to remand for a new trial was unanimous
- Although a lower court ruled that the death penalty was disproportionate, the Supreme Court held that the State could seek the death penalty at the retrial
- State prosecutors, not the Supreme Court, reached a deal allowing Copeland to leave prison in March 2011

[22] Smith v. State, 357 S.W.3d 322, 327-28 (Tenn. 2011).
[23] *Id.* at 345.
[24] *Execution Off the Table for Leonard Smith in Shooting of Novella Webb*, Tricities.com, Nov. 16, 2012, http://www.tricities.com/news/local/article_802eea96-3066-11e2-9dfb-0019bb30f31a.html.

Arthur Copeland was convicted of the 1998 killing of Andre Jackson, largely on the basis of eyewitness testimony, and sentenced to death. The trial court did not allow Copeland to introduce expert testimony on the reliability of eyewitness identification. On appeal, an intermediate appellate court ruled that the trial court had made a procedural error and remanded the case. The appellate court also ruled that the death sentence was disproportionate to the crime and vacated the death sentence.[25]

In a unanimous decision joined by two Republican-appointed justices, the Tennessee Supreme Court held that there was sufficient scientific evidence of problems with eyewitness testimony to permit Copeland to call an expert witness to describe problems associated with eyewitness testimony.[26] Thus, the Court remanded the case for a new trial. Furthermore, the Court found that the death penalty would *not* be disproportionate in this case and, overruling the intermediate court, allowed the State to seek the death penalty on remand.

After the Supreme Court remanded the case, state prosecutors reached a plea deal with Copeland. Under the terms of the plea, Copeland pleaded guilty to second-degree murder and was sentenced to 14 years in prison. After his release, Copeland was arrested and charged with kidnapping and rape.[27]

The Tennessee Supreme Court and the Death Penalty

- The current Supreme Court has set execution dates for 9 inmates
- Since 2006, the Court has affirmed 85% of death sentences on direct appeal, and has *not once* determined that the death penalty should be ruled out
- Ramsey's claim that the Court "vacated" Nickolus Johnson's death sentence is simply wrong—the Court granted an automatic stay of the execution while Johnson pursues post-conviction relief
- The Court has overturned lower court decisions finding the death penalty inapplicable in certain circumstances

Slide 13 implies that the Tennessee Supreme Court has been instrumental in slowing the execution of death row inmates. In Tennessee, the Supreme Court is responsible for setting execution dates once death row inmates have exhausted all of their appeals. In late 2013, the State moved to set execution dates for those inmates whose appeals have been exhausted. The current Supreme Court approved 9 of those execution dates, and Tennessee currently has 9 executions scheduled between October of 2014 and

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[25] State v. Copeland, 226 S.W.3d 287, 296-98 (Tenn. 2007).

[26] *Id.* at 299-301.

[27] *Man with Long Criminal History, Inlcuding Time on Death Row, Accused of Raping Girlfriend*, Knoxville News, Sept. 5, 2013, http://www.knoxnews.com/news/2013/sep/05/former-death-row-inmate-accused-of-brutal-rape/.

November of 2015. The current Supreme Court has therefore approved the execution of more inmates—9—than the 6 that Tennessee has executed since the nationwide moratorium on the death penalty was lifted 1976.[28]

Although Lt. Gov. Ramsey attempts to portray the Supreme Court as anti-death penalty, many of the delays that have limited executions in Tennessee are beyond the Court's control. From 2011 to the end of 2013 the State was unable to perform any executions due to a nationwide shortage of one of the drugs used in executions.[29] Additionally, as noted above, the Supreme Court has expressed a willingness to set execution dates for many of the inmates currently on death row. Since 2006, the Supreme Court has heard 21 direct appeals in capital cases and affirmed 18 sentences (85.7%), granted 2 resentencing hearings, and ordered one new trial. In the *Copeland* trial described above, the Supreme Court actually reversed an appellate court's decision that the death penalty would be constitutionally barred for Copeland.

The slide identifies one case in particular, Nickolus Johnson's, as evidence that this Supreme Court is reluctant to impose the death penalty. However, the Court, in a unanimous opinion authored by Justice Lee, actually affirmed Johnson's death sentence on direct appeal.[30] The Court scheduled Johnson's execution for April 22, 2014. Johnson applied for post-conviction relief in April of 2014, and the Supreme Court granted an automatic stay of the execution pending resolution of Johnson's claims. The Supreme Court did not vacate the execution, and in fact the claim for post-conviction relief and the stay are considered "a standard move."[31]

Use of Victims' Photos

- The Supreme Court actually affirmed the conviction in the case cited on Slide 14, despite finding that the court erred in admitting the photo
- Victims' photos are admissible if they are relevant and not unfairly prejudicial
- Attacking the Court for protecting the integrity of trials is a very unpersuasive strategy

Slide 14 states that the Court has "taken a dim view of allowing victims' photographs to be introduced as evidence because it could jeopardize the integrity of the trials," the implication being that the Court's efforts to preserve the integrity of criminal trials are a bad thing. Ironically, in the case

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[28] *See* Memorandum from Chief Justice Wade, Tennessee Supreme Court, to the Judges of Tennessee, Mar. 11, 2014.

[29] *Tennessee Moves to Single-Drug Executions Despite Pentobarbital Shortage*, Reuters, Sept. 27, 2013, http://www.reuters.com/article/2013/09/28/usa-execution-tennessee-idUSL2N0HN2CR20130928.

[30] State v. Johnson, 401 S.W.3d 1, 27 (Tenn. 2007).

[31] *Death Row Inmate Nickolus Johnson Granted Stay*, Apr. 3, 2014, http://www.wate.com/story/25156853/death-row-inmate-nickolus-johnson-granted-stay.

cited on Slide 14 the Court actually *affirmed* a first-degree murder conviction despite finding that the trial court erred in admitting the photograph.[32] Tennessee, like all states, requires that evidence be relevant and not unfairly prejudicial in order to be used at trial. Photographs of victims, both before and after the alleged crime, are admissible provided that they are "relevant to an issue that the jury must decide."[33] However, courts should preclude prosecutors from introducing photographs if the photographs are not relevant to helping the jury decide factual issues and are introduced merely to unfairly arouse the sympathy of the jury. The Supreme Court is responsible for ensuring that prosecutors do not cross the line, and its rulings appear in accordance with those of other state supreme courts. Where trial courts improperly admit photographs, the Supreme Court reviews the errors under the deferential "harmless error" standard and regularly upholds convictions where pictures were improperly introduced at trial.[34]

The Supreme Court's Business-Related Decisions

- 3 of the 8 cited cases did not involve the Supreme Court
- In 4 of the remaining 5, the parties had not yet been to trial (the plaintiffs had not had their day in court), and the Court's decision merely allowed the case to proceed
- In 2 of the 5 cases (*Becker* and *Lind*) the Court was bound by statutes, passed by the Legislature, to allow the cases to proceed

The slide deck details 8 business decisions that the Supreme Court was involved in and attempts to use those decisions to paint the Court as "anti-business." Each case, along with Lt. Gov. Ramsey's distortions of the case, is described below.

Becker v. Ford Motor Company[35]

- The Supreme Court was bound by the law as promulgated by the Tennessee Legislature—the Court did not create the law
- The Supreme Court's decision did not resolve the case in favor of either party and did not increase Ford's potential liability
- The decision was unanimous and joined by both Democrat- and Republican-appointed justices

On July 28, 2012, Phillip Becker lost control of his Ford pickup truck and struck a light pole. Phillip was uninjured, but the passenger, his father

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[32] *See* State v. Adams, 405 S.W.3d 641 (Tenn. 2013) (although the trial court erred in admitting the photographs, the Supreme Court deemed the error harmless).
[33] *Id.* at 657 (quoting State v. Cole, 155 S.W.3d 885, 911-12 (Tenn. 2005)).
[34] *See id.* at 657-58 (gathering cases).
[35] All information in this subsection comes from Becker v. Ford Motor Company, 2014 WL 901510 (Tenn. 2014).

Michael Becker, was injured. Michael Becker and his wife sued Ford Motor Company in state court. Ford removed the case to federal court and argued, in its answer, that the driver Phillip Becker caused the accident. Per Tennessee law, Michael then had 90 days to amend his original complaint to include Phillip as a defendant and responsible party. However, Michael's amendment occurred after the one-year statute of limitations had expired. The Supreme Court nevertheless held that the statute allowing amendments specifically grants plaintiffs a 90-day window to amend their complaints *if* the defendant argues that a third party shares responsibility for an accident. The particular question of law was well-settled in Tennessee; the Tennessee Supreme Court did not create new law, and in fact was bound by the language of the statute passed by the Legislature.

The Supreme Court did not resolve the case in favor of either party or change the law in Tennessee. Instead, it simply answered a question posed to it by the federal district court in Tennessee. In this case its ruling permitted an additional *defendant* to be added to the case, not an additional plaintiff. Under no circumstances could the decision increase Ford's liability.

Cracker Barrel v. Epperson[36]

- The agreement Cracker Barrel relied on did not explicitly provide for recovery of attorneys' fees, as is required under law
- Rather than being a "direct assault on 'loser pays' contractual language," as the slide deck says, this case instead provides business attorneys with a clear guide for how to draft contracts that will lead to recovery of attorneys' fees
- The decision was unanimous and joined by both Democrat- and Republican-appointed justices

Cracker Barrel Old Country Store ("Cracker Barrel") and Mr. Richard Epperson owned adjoining property subject to certain mutual agreements and restrictions regarding the use of their respective pieces of property. Part of the agreement stated that, if one of the parties breached, that party would be liable for "all costs and expenses of any suit or proceeding." In 2005, Epperson proposed a plan that would put him in breach of the agreement. Cracker Barrel sued and prevailed in court. Cracker Barrel subsequently sought attorneys' fees under the cost-shifting provision of the agreement. Both the trial court and an intermediate appellate court denied Cracker Barrel's request for attorneys' fees. The Supreme Court heard Cracker Barrel's appeal and also denied its request.

Under the "American rule," each party in a lawsuit is responsible for paying its own attorneys' fees. This rule is widely recognized and adopted in the United States, and can only be overcome if a contract, statute, or

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[36] All information in this subsection comes from Cracker Barrel Old Country Store, Inc. v. Epperson, 284 S.W.3d 303 (Tenn. 2009).

exception explicitly provides for a losing party to pay the prevailing party's fees. In the case of contracts, language specifically referring to "reasonable attorneys' fees" must be included in order for the prevailing party to receive such compensation. In this case, the agreement did not include a specific provision for attorneys' fees. Accordingly, the Supreme Court had little choice but to find for the defendant. The Court also issued an unmistakable message to attorneys responsible for drafting contracts—make sure that the contract includes the proper language if you want it to be enforced in court.

Gossett v. Tractor Supply Company[37]

- The Supreme Court did not overturn any case law regarding retaliatory discharge because this case involved discharge for failure to participate in illegal activity, not failure to report illegal activity
- Mr. Gossett never received his day in court and the Supreme Court's decision, rather than deciding the case in favor of either party, merely remanded the case for a trial
- The 3-justice majority opinion was authored by a Republican-appointed justice

In October 2003, Mr. Gary Gossett was allegedly asked by his employer to alter financial reports in a way that would inflate the company's quarterly earnings. Such alterations would have been in violation of federal securities laws. Mr. Gossett refused, and several weeks later he was fired. Mr. Gossett sued for retaliatory discharge. Tractor Supply Company moved for summary judgment and argued that it had a legitimate, non-pretextual reason for firing Mr. Gossett. The trial court granted Tractor Supply Company's motion, but an intermediate appellate court reversed. The Supreme Court affirmed the appellate court's decision and remanded the case for trial.

Lt. Gov. Ramsey alleges that the "Supreme Court eroded Tennessee's right to work case law by setting aside legal precedent that required that 'reporting the alleged illegal activity is an essential element of a cause of action for retaliatory discharge.'" However, Tennessee law never required an employee to report alleged illegal activity in order to claim retaliatory discharge for failure to participate in illegal activity. Instead, reporting is only required when the retaliatory discharge claim is for refusing to remain silent about an illegal activity. Thus, the Supreme Court did not overturn existing law regarding retaliatory discharge for failure to participate in illegal activity. Although the *Gossett* decision featured a 3-2 split among the justices, all 5 agreed that reporting of illegal activity is not a required element for retaliatory discharge for failure to participate in illegal activity.

[37] All information in this subsection comes from Gossett v. Tractor Supply Co., 320 S.W.3d 777 (Tenn. 2010).

The Supreme Court did not decide this case in favor of either party, but instead remanded for trial.

Dewald v. HCA of Tennessee[38]

- The Supreme Court did not decide the case in favor of either party, but instead remanded the case for a trial
- The Court reaffirmed that hospitals can avoid liability for the acts of independent contractors *if* they provide meaningful written notice to the patient
- The unanimous decision adopted a tort rule used by a majority of the states

On January 25, 2004, Ms. Amanda Dewald was admitted to the StoneCrest emergency room, operated by HCA of Tennessee. Dr. Lambelle, a radiologist who examined Ms. Dewald's images, signed and sent a report erroneously diagnosing Ms. Dewald with advanced lung cancer. Ms. Dewald subsequently spent two days in a hospital under the mistaken belief that she had lung cancer. Ms. Dewald sued HCA of Tennessee for Dr. Lambelle's alleged negligence. HCA of Tennessee argued that it was not responsible for Dr. Lambelle's negligence because Dr. Lambelle was an independent contractor. HCA further pointed out that Ms. Dewald's husband had signed a release that explicitly stated that the hospital's radiologists were independent contractors and not agents or employees of the hospital. A trial court denied HCA's motion for summary judgment, and an intermediate appellate court reversed. The Supreme Court heard the case and denied HCA's motion for summary judgment, finding that there were issues of fact remaining to be resolved.

The Supreme Court's decision adopted a rule employed by the majority of U.S. jurisdictions. In the case, the Supreme Court held that HCA could be liable if, among other things, the plaintiff looked to the hospital rather than the individual physician for services and the patient accepted those services in the reasonable belief that they were provided by the hospital or a hospital employee. Because these were issues of fact that should properly be submitted to a jury, the Supreme Court remanded the case for trial.

Lind v. Beaman Dodge Chrysler Jeep[39]

- The Court was bound by statute to allow the case to proceed to trial because the Legislature passed a law holding product sellers liable if the product manufacturer becomes insolvent

[38] All information in this subsection comes from Dewald v. HCA Health Services of Tennessee, 251 S.W.3d 423 (Tenn. 2008).

[39] All information in this subsection comes from Lind v. Beaman Dodge, Inc., 256 S.W.3d 889 (Tenn. 2011).

- The Court permanently barred Mr. Lind from pursuing one of his two claims
- The unanimous decision did not decide the issue in favor of either party, but rather remanded the case for trial

On March 28, 2006, Mr. Michael Lind was injured in an accident involving his Dodge Ram pickup truck. Mr. Lind sued both the manufacturer, Chrysler, and the seller, Beaman Dodge, but entered into a voluntary nonsuit agreement with the seller. In April of 2009, before Mr. Lind could obtain any recovery, Chrysler declared bankruptcy. Mr. Lind subsequently sued Beaman Dodge for both negligence and strict liability. Beaman Dodge moved for summary judgment because the suit was filed after the one-year statute of limitations had run. The trial court denied Beaman Dodge's claim, and the Supreme Court agreed to hear the appeal.

The Supreme Court held that Mr. Lind's negligence claim was barred by the one-year statute of limitations because he could have filed that claim at the time that he sued Chrysler in 2006. Thus, the Court permanently barred Mr. Lind from pursuing one of his claims. The Court allowed the second claim to proceed, however, because Tennessee law permits strict liability actions to be brought against product sellers (Beaman) if the manufacturer (Chrysler) is declared insolvent. Because the action can only be brought once the manufacturer is declared insolvent, the Court determined that the one-year statute of limitations must run from the date of declaration of insolvency. Accordingly, because Mr. Lind filed his complaint within one year of Chrysler being declared insolvent, the Court allowed him to proceed to trial on that claim.

Hill v. NHC Nashville[40]

- The Supreme Court never heard the *Hill* case
- Contrary to Lt. Gov. Ramsey's assertion on Slide 21, the Court has specifically found that mandatory mediation/arbitration provisions in nursing home cases are legal in Tennessee

On June 21, 2003, Ms. Barbara Hill died while being transported from a nursing home operated by NHC Nashville to a local emergency room. Her children filed a wrongful death action. NHC Nashville moved to compel arbitration per the terms of an admission agreement that Ms. Hill signed. The trial court denied the motion, and an intermediate appellate court affirmed. Both courts found that the arbitration agreement was unconscionable and, therefore, unenforceable.

The Supreme Court never heard the *Hill* case. In fact, the Tennessee Supreme Court has held that binding mediation and arbitration clauses in

[40] All information in this subsection comes from Hill v. NHC Healthcare/Nashville, LLC, 2008 WL 1901198 (Ct. App. Tenn. 2008).

nursing home cases are valid in Tennessee.[41] In *Owens*, the Supreme Court specifically denied the plaintiff's claims that such arbitration agreements are unenforceable. The Court did, however, leave open the possibility that certain arbitration clauses would be unenforceable as unconscionable contracts of adhesion. Thus, Lt. Gov. Ramsey's assertion that the Court "found . . . a contract provision requiring disputes [to] be resolved in arbitration to be unconscionable" is patently false.

Myers v. NHC McMinnville[42]

- The Supreme Court played no role in the *Myers* decision
- The appellate court found that a nursing home's corporate parents were liable for punitive damages but specifically did not adopt the jury's determination of $29.6 million in punitive damages, instead choosing to remand the case for another jury decision

From March 5, 2004, until his death on August 24, 2005, Mr. Cheatum Myers was in and out of a nursing home operated by NHC McMinnville. After his death, Mr. Cheatum's daughters filed suit against NHC McMinnville and its corporate parents. The trial court allowed the plaintiffs to seek punitive damages against NHC McMinnville, but precluded them from seeking punitive damages against NHC McMinnville's corporate parents. Nevertheless, the trial court allowed the jury to decide what punitive damages it *would* award against the corporate parents if the corporate parents were subject to punitive damages. The jury returned a $163,000 punitive damages award against NHC McMinnville, and a $29.6 million punitive damages award against the corporate parents (though the $29.6 million award was unenforceable, since the trial court previously decided that the corporate parents were exempt from punitive damages).

The plaintiffs appealed the trial court's finding that the corporate parents were exempt from punitive damages. The appellate court held that the corporate parents were subject to punitive damages. However, despite a jury finding that the punitive damages against the corporate parents should be $29.6 million, the appellate court did not adopt the $29.6 jury award. Instead, the appellate court remanded the case for a second determination of punitive damages. The Supreme Court played no role in the decision.

Sarah White v. Target Corp.[43]

- The Supreme Court was never involved in this case

[41] Owens v. National Health Corp., 263 S.W.3d 876 (Tenn. 2007).

[42] All information in this subsection comes from Smartt v. NHC Healthcare/McMinnville, LLC, 2009 WL 482475 (Ct. App. Tenn. 2009).

[43] All information in this subsection comes from White v. Target Corp., 2012 WL 6599814 (Ct. App. Tenn. 2012).

- The appellate court did not find in favor of White, but instead remanded the case for trial
- The legislature has relaxed the standard for summary judgment since this case, and if this case was brought today Target would likely prevail before it went to trial
- The unanimous decision was authored by a Republican-appointed judge (Holly Kirby) and joined by a Republican-appointed judge (David R. Farmer) and a Democrat-appointed judge (J. Steven Stafford)

On December 7, 2004, Sarah White went to a Target store and used the dressing room to try on clothing. While in the dressing room Ms. White noticed a smoked-Plexiglas dome that she believed contained a security camera. Two Target employees confirmed to her that it did contain a camera, but the manager told her that it was a "dummy dome" with no camera. Ms. White sought an apology and confirmation that there was no camera in the dome but received neither. Ms. White sued Target for intentional infliction of emotional distress and misappropriation of her image and sought a total of $22 million.

Target filed a pre-trial motion for summary judgment, which the trial court granted. Target therefore prevailed before the lower court before Ms. White had her day in court to argue her case. Ms. White appealed, and the appellate court found that the trial court had applied the wrong legal standard in deciding Target's motion for summary judgment. The appellate court overturned the ruling, sending the case back to the trial court for a full trial. The appellate court did not decide the case in favor of either party, and the Tennessee Supreme Court was never involved. Since the appellate court's decision, the Tennessee legislature has passed a law making it easier for defendants, like Target in this case, to prevail on motions for summary judgment. Presumably, if this case were filed today, Target could successfully move for summary judgment. Thus, the case is anachronistic if one is trying to use it as an example of judicial activism.

New Poll: Tennessee Voters Overwhelmingly Reject Politics in Judicial Races

August 21, 2014

New Poll: Tennessee Voters Overwhelmingly Reject Politics in Judicial Races

Contact: Laurie Kinney, lkinney@justiceatstake.org, 202-588-9454, cell 571-882-3615

WASHINGTON, DC – August 21 – A post-election poll of Tennessee voters who participated in the August 7 election finds a strong majority is opposed to partisan politics playing a role in the courts or in retention elections for judges. The poll, conducted on the evening of August 7, came in the wake of a highly politicized retention race for three incumbent justices, Chief Justice Gary Wade and Justices Cornelia Clark and Sharon Lee, in which more than $1.4 million was spent on television advertising.

"Tennessee voters decisively rejected efforts to politicize their courts," said Bert Brandenburg, executive director of Justice at Stake. "They want judges to answer to the law, not political pressure."

Eighty-five percent of voters polled said it is "very" or "somewhat" important to keep politics out of the courts, with a full 70 percent calling it "very important." Eighty percent said they were "very" or "somewhat" concerned that politically charged retention elections might put pressure on judges to decide cases based on public opinion, and two-thirds said they were "very" or "somewhat" concerned about the role that out-of-state interests played in the judicial election.

All three justices were retained in spite of well-funded efforts to oust them, by both Lt. Gov. Ron Ramsey and out-of-state groups such as the Republican State Leadership Committee and Americans for Prosperity. The judges were forced to raise more than $1 million to defend themselves. Judicial election campaign fundraising can threaten impartial justice, because it forces judges to raise money from lawyers and parties who may appear before them.

Polling was conducted by Republican polling firm American Viewpoint, which surveyed 500 Tennessee voters on Election Day, August 7. The margin of error was 4.4%.

Results:

Percentage of voters ranking this statement as “Very Important”: “We need to keep politics out of the courts”:

- Total: 70 %
- Voters who voted to “Retain All” justices: 77%
- Voters who voted to “Replace All” justices: 67%

Percentage of voters calling themselves “Very Concerned” about this issue: “Politically charged retention elections might put pressure on judges to decide cases based on public opinion”:

- Total: 58%
- Voters who voted to “Retain All” justices: 64%
- Voters who voted to “Replace All” justices: 60%

Percentage of voters calling themselves “Very Concerned” about this issue: “The role that out of state interests played”:

- Total: 43%
- Voters who voted to “Retain All” justices: 55%
- Voters who voted to “Replace All” justices: 38%

Ranked by “Very Concerned”:

“Politically charged retention elections might put pressure on judges to decide cases based on public opinion”

- Total: 58 %
- Voters voting to “Retain All”:

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Justice at Stake is a nonpartisan, nonprofit organization working to keep America's courts fair and impartial. Justice at Stake and its 50-plus state and national partners educate the public, and work for reforms to keep politics and special interests out of the courtroom - so judges can protect our Constitution, our rights and the rule of law. For more about Justice at Stake, go to www.justiceatstake.org or www.gavelgrab.org.