

ROBERTS, C. J., concurring

SUPREME COURT OF THE UNITED STATES

No. 105, Orig.

STATE OF KANSAS, PLAINTIFF *v.* STATE OF
COLORADO

ON EXCEPTION TO REPORT OF SPECIAL MASTER

[March 9, 2009]

CHIEF JUSTICE ROBERTS, with whom JUSTICE SOUTER joins, concurring.

I join the opinion of the Court in full. I do so only, however, because the opinion expressly and carefully makes clear that it in no way infringes this Court’s authority to decide on its own, in original cases, whether there should be witness fees and what they should be.

Our appellate jurisdiction is, under the Constitution, subject to “such Exceptions, and . . . such Regulations as the Congress shall make.” Art. III, §2. Our original jurisdiction is not. The Framers presumably “act[ed] intentionally and purposely in the disparate inclusion or exclusion” of these terms. *INS v. Cardoza-Fonseca*, 480 U. S. 421, 432 (1987) (internal quotation marks omitted).

It is accordingly our responsibility to determine matters related to our original jurisdiction, including the availability and amount of witness fees. For the reasons given by the Court, I agree that \$40 is a reasonable choice for the fees at issue here. But the choice is ours.