No. 114,573

IN THE SUPREME COURT OF THE STATE OF KANSAS

LARRY T. SOLOMON, CHIEF JUDGE,
30TH JUDICIAL DISTRICT of the STATE OF KANSAS

Plaintiff-Appellee,

v.

THE STATE OF KANSAS,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the District Court of Shawnee County,
Honorable Larry Hendricks, Judge,
District Court Case No. 2015-cv-156

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Oral Argument: 20 Minutes

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NATURE OF THE CASE

This action was filed by the Honorable Larry T. Solomon, Chief Judge of the 30th Judicial District, seeking a declaratory judgment that Section 11 of 2014 Senate Substitute for House Bill 2338 ("HB 2338") unconstitutionally infringes on the Kansas Supreme Court's general administrative authority under Article III, § 1, of the Kansas Constitution. HB 2338, § 11, changes the selection process for chief district court judges to provide that chief judges will be chosen by their district court colleagues instead of appointed by the Kansas Supreme Court.

On September 2, 2015, the District Court issued a Memorandum Decision and Order denying the State's Motion to Dismiss and granting Chief Judge Solomon's Cross-Motion for Summary Judgment. The District Court concluded that Chief Judge Solomon has standing to bring the action, that the matter is ripe for judicial review, and that—on the merits—HB 2338, § 11, violates Article III, § 1.

The State timely appealed.

STATEMENT OF THE ISSUES

1. Does this matter present a justiciable case or controversy?
2. Is HB 2338, § 11, a proper exercise of the Legislature's legislative power under Article II, including its specific power in Article II, § 18, to provide for the selection of "officers," or is it an unconstitutional infringement on the Kansas Supreme Court's "general administrative authority" under Article III, § 1?

STATEMENT OF FACTS

In 2014, the Kansas Legislature passed Senate Substitute for House Bill 2338, and the Governor signed it into law. *See* L. 2014, ch. 82. Section 11 of the bill amended K.S.A. 20-329 to provide that the district court judges in each judicial district will select their chief judge, starting January 1, 2016. Previously, chief judges have been selected in accordance with Kansas Supreme Court Rule 107 (which endorsed and continued a previously existing statutory method for selecting chief judges), which declares that the Kansas Supreme Court appoints chief district court judges. K.S.A. 20-329 continues to provide that chief district court judges are subject to the supervision of the Kansas Supreme Court and are required to follow Supreme Court rules in exercising their clerical and administrative responsibilities.

Plaintiff Larry T. Solomon is the Chief Judge of the 30th Judicial District, and he will continue to hold that position until at least January 1, 2016. K.S.A. 20-329 allows him to continue as chief judge after that date if he is selected by the district court judges in his district, and he can vote for himself.

On February 18, 2015, Chief Judge Solomon filed a Petition in Shawnee County District Court seeking a declaratory judgment that HB 2338, § 11, unconstitutionally infringes on the Kansas Supreme Court's general administrative authority under Article III, § 1, of the Kansas Constitution. Vol. I at 3-7. The State filed a Motion to Dismiss and Memorandum in Support on March 26, arguing that Chief Judge Solomon lacks standing because he has not been injured as a result of the prospective change in selection process, that the matter is not ripe for review, and that the Petition should be dismissed for failure to state a claim because HB 2338, § 11, is a valid exercise of legislative power. Vol. I at

8-41; *see also* Vol. II at 79-101 (State's combined Motion to Dismiss Reply and Summary Judgment Response). Chief Judge Solomon responded with a Cross-Motion for Summary Judgment. Vol. I at 42-78; *see also* Vol. II at 102-17 (Chief Judge Solomon's Summary Judgment Reply).

The District Court held oral argument on the parties' motions on August 28, 2015, Vol. III (Transcript), and five days later entered a Memorandum Decision and Order denying the State's Motion to Dismiss and granting Chief Judge Solomon's Cross-Motion for Summary Judgment. Vol. II at 118-55. The next day, the District Court, with the consent of both parties, granted a stay of its order granting summary judgment pending resolution of this appeal in order to prevent any possibility that the provisions of a separate statute, K.S.A. 2015 Supp. 20-1a18, which purports to condition funding for the judiciary on the validity of 2014 HB 2338, would be triggered by the District Court's action. Vol. II at 156-59 (Motion for Stay); *id.* at 160-61 (Order Granting Stay).

The State filed a Notice of Appeal on September 18, 2015. Vol. II at 162.

On September 22, 2015, the Attorney General filed an action in Neosho County District Court challenging the condition on judicial funding in K.S.A. 2015 Supp. 20-1a18. The district court entered a temporary injunction preventing operation of that statute until at least March 15, 2016. Appendix 1, Order Granting Temporary Injunction and Stay, Neosho County District Court, Sept. 22, 2015. Thus, there is no possibility that this Court's decision in this appeal could be construed as potentially eliminating judicial branch funding, at least until March 15, 2016, a time by which the Legislature will have reconvened and can act swiftly to prevent any such consequence.

ARGUMENT

The District Court improperly granted summary judgment to Chief Judge Solomon two reasons. First, the court lacked jurisdiction because the Petition fails to present a justiciable case or controversy. Second, even if this matter were justiciable, the Petition fails to state a claim because HB 2338, § 11, is a proper exercise of longstanding legislative authority to regulate the selection of "officers" under Article II, § 18, of the Kansas Constitution; the law does not unconstitutionally infringe on the Kansas Supreme Court's general administrative authority under Article III, § 1.

II. This Matter Does Not Present a Justiciable Case or Controversy.

Kansas courts only have jurisdiction to decide cases or controversies. *See Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1107 (2014). In order for a matter to constitute a case or controversy, (1) the parties must have standing, (2) the issues must not be moot, (3) the issues must be ripe for review, and (4) the issues must not present a political question. *Id*.; *see also State v. Snow*, 282 Kan. 323, 343, 144 P.3d 729 (2006) (standing); *Smith v. Martens*, 279 Kan. 242, 244–45, 106 P.3d 28 (2005) (mootness); *Department of Revenue v. Dow Chemical Co.*, 231 Kan. 37, 41, 642 P.2d 104 (1982) (quoting *Public Service Comm'n*, 344 U.S. 237, 243-44 (1952) (ripeness)); *Van Sickle v. Shanahan*, 212 Kan. 426, 438, 511 P.2d 223 (1973) (adopting standards for political questions stated in *Baker v. Carr*, 369 U.S. 186, 210, 217 (1962)). Two of these requirements—standing and ripeness—are not met here, depriving the court of subject matter jurisdiction.

The State raised and argued the lack of justiciability below. Vol. I at 13-15; Vol. II at 80-83. The District Court rejected the State's arguments. Vol. II at 125-31.

Justiciability is a matter of law over which this Court's review is de novo. *See Gannon*, 298 Kan. at 1118-19.

A. Chief Judge Solomon Lacks Standing Because He Has Not Been Injured by the Prospective Change in the Chief Judge Selection Process.

To have standing, a party "must demonstrate that [1] he or she suffered a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct." *Kansas Bldg. Industry Workers Compensation Fund v. State*, No. 108,607, 2015 WL 5081350, at * 17 (Kan. S. Ct. Aug. 28, 2015) (quoting *Gannon*, 298 Kan. at 1123). A cognizable injury, sometimes referred to as an injury in fact, is an injury that is "concrete, particularized, and actual or imminent." *Gannon*, 298 Kan. at 1123.

At most, Chief Judge Solomon alleges a generalized institutional injury to the Judicial Branch that is insufficient to confer standing (although even this supposed injury ultimately is not present because HB 2338, § 11, is constitutional). Because of the "institutional" nature of the claim, this case is similar to the U.S. Supreme Court's decision in *Raines v. Byrd*, 521 U.S. 811 (1997), which involved a suit filed by members of Congress who claimed that the line item veto statute undermined the separation of powers and diminished their power as legislators. The line item veto law was in fact unconstitutional, as the Supreme Court later held in *Clinton v. City of New York*, 524 U.S. 417 (1998). But in *Raines*, the Supreme Court held that the plaintiff members of Congress lacked standing to challenge the law's constitutionality because they only suffered "a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Raines*, 521 U.S. at 821. This injury was "wholly abstract and widely dispersed," not particularized as required to establish standing. *Id*. at 829.

The same is true here. Chief Judge Solomon's alleged injury to the Judicial Branch, even assuming it exists, would be generally and widely shared by all judges (indeed, by all litigants and even by the general public), just as the injury in *Raines* was shared by all members of Congress. Like the members of Congress in *Raines*, Chief Judge Solomon has not been injured in any personalized and individual way. Indeed, he currently remains the Chief Judge of the 30th Judicial District.

Chief Judge Solomon argues that his alleged injury is particularized because he is a chief judge and the law changes the selection process for chief judges. But Chief Judge Solomon has not suffered any harm at this time, and he has made no showing that he will lose his position as chief judge because of the new selection method. Thus, the possibility that he *might* lose his position as chief judge at some point in the future is speculative at best, not "actual or imminent" as required for standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (holding that a threatened injury must be "certainly impending" to be actual or imminent—"allegations of *possible* future injury are not sufficient" (quotation marks omitted)).

Particularly in light of Chief Judge Solomon's lengthy service and experience as a chief judge, his fellow district court judges may well choose to retain him as chief judge under the new selection method, in which case he will never suffer *any* injury. In fact, it is entirely possible the new chief judge selection provision will actually *benefit* Chief Judge Solomon by eliminating any risk that the Supreme Court could decline to reappoint him at the end of a term. There is *no* showing in the record that Chief Judge Solomon's service as chief judge is more likely to continue if the procedure is reappointment by this

Court rather than by selection by his peers, and only the members of this Court can truly know the likelihood of the former.

The District Court held that the change in selection procedure alone is a cognizable injury—even if it *never* causes Chief Judge Solomon to lose his position—based on the District Court's decision earlier this year in *Kansas National Education Association v. State*, Shawnee County Case No. 2014-cv-789 (attached as Appendix 2). *See* Vol. II at 129 ("[T]he Court adopts the reasoning it articulated in Case No. 2014-CV-789."). In *KNEA*, the District Court found that a teachers' union had standing to challenge a change in the due process hearing termination procedure for school teachers because continued employment subject to the due process procedure was like a property interest or a form of insurance. *See* Appendix 1 at 13-14. The State disagrees with the District Court's standing analysis in that case, which is currently on appeal. *See* Appellate Case No. 114,135.

In any event, the justification for standing is considerably weaker here than in the *KNEA* case. Contrary to the District Court's analysis, Chief Judge Solomon does not have a constitutionally protected "right" or "entitle[ment]" to be evaluated by the Supreme Court under the previous chief judge selection process. Vol. II at 128-29. The old selection process was nothing like a form of insurance, tenure, or even a due process hearing termination procedure; it was not created to protect a current chief judge from being improperly dismissed without "cause." Under K.S.A. 2013 Supp. 20-329 and Supreme Court Rule 107, the Supreme Court could choose a new chief district court judge for *any* reason, or for *no* reason at all. In stark contrast, the *KNEA* plaintiffs assert a property interest in the due process hearing system, but neither Chief Judge Solomon nor

any other chief judge has a property interest in serving as chief judge. The interests underlying the two cases are fundamentally different.

The District Court also relied on the proposition that the standing inquiry is "less rigorous" in the declaratory judgment context. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897, 179 P.3d 366 (2008). While true, this Court has also made clear that "actual cases and controversies are still required" and, indeed, *Morrison* itself held that a lawsuit brought pursuant to the "judicial trigger" at issue in that case would not present an actual case or controversy. *Id.* One of the hallmarks of a case or controversy is that the plaintiff must have suffered an injury that is concrete, particularized, and actual or imminent. *Gannon*, 298 Kan. at 1123. Otherwise, a declaratory judgment would be nothing more than a prohibited advisory opinion. That is so here just as it was in *Morrison*.

Because Chief Judge Solomon has not suffered any harm at this time as a result of the change in chief judge selection process, has made no showing that he is likely *ever* to suffer harm under the new system for selecting chief judges, and at most asserts a generalized, abstract injury to the Judicial Branch as a whole, he lacks standing, and this Court lacks subject matter jurisdiction.

B. This Matter Is Not Ripe Because There Is No Harm to Chief Judge Solomon at This Time, and There May Never Be Such Harm.

This matter is not ripe for much the same reasons Chief Judge Solomon cannot establish standing. This Court addressed ripeness in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 179 P. 3d 366 (2008):

> The doctrine of ripeness is "designed 'to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *National Park Hospitality Ass'n v.Department of*

> *Interior*, 538 U.S. 803, 807, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract. *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 244, 73 S.Ct. 236, 97 L.Ed. 291 (1952). Stated yet another way, the doctrine prevents courts from being "asked to decide 'ill-defined controversies over constitutional issues,' [citation omitted], or a case which is of 'a hypothetical or abstract character.' [Citation omitted.]" *Flast*, 392 U.S. at 100, 88 S. Ct. 1942.

285 Kan. at 892. A claim is not ripe if it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *See Texas v. United States*, 523 U.S. 296, 300 (1998). Here, Chief Judge Solomon's potential loss of his position as chief judge is speculative and hypothetical; such injury may never occur. Indeed, as discussed above, Chief Judge Solomon's service as chief judge actually may be as likely, or more likely, to end under the previous system of selection than under the new one. Accordingly, this matter is not ripe and should have been dismissed for lack of subject matter jurisdiction.

II. HB 2338, § 11, is a Proper Exercise of Longstanding Legislative Power, and Does Not Unconstitutionally Infringe on the Kansas Supreme Court's General Administrative Authority.

The District Court erred in granting summary judgment to Chief Judge Solomon on the merits. The court analyzed the constitutionality of HB 2338, § 11, under the separation of powers test articulated in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 179 P.3d 366 (2008). But the court significantly misapplied the test and improperly relied on a statement from *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1 (1983), that is both dictum and wrong as a matter of law.

The State argued that HB 2338, § 11, is a valid exercise of the legislative power vested in the Legislature by Article II and does not violate Article III, § 1, of the Kansas Constitution in both its Memorandum in Support of its Motion to Dismiss and in its

Reply. Vol. I at 15-26; Vol. II at 83-96. Because the District Court decided this issue as a matter of law, based on undisputed facts, this Court's review is de novo. *See State v. Mossman*, 294 Kan. 901, 906, 281 P.3d 153 (2012).

A. The Kansas Constitution Grants the Legislature Substantial Legislative Power to Regulate the Judicial System.

The Legislature relies on its legislative power to regulate court administration and procedure all the time. The Code of Civil Procedure, K.S.A. 60-201 *et seq.*, the Code of Criminal Procedure, K.S.A. 22-2101 *et seq.*, and the Rules of Evidence, K.S.A. 60-401 *et seq.*, are prime examples. The Legislature also has established residency requirements for district court judges, K.S.A. 20-331, specified the number and location of district magistrate judges in each district, K.S.A. 20-338, and determined that each county must have at least one judge, K.S.A. 20-301b. The Legislature even has addressed such matters as requiring that Supreme Court opinions include a syllabus, K.S.A. 20-111 and 20-203, setting minimum standards for the reproduction and preservation of court records, K.S.A. 20-159, and requiring courts to accept credit cards for the payment of fees, K.S.A. 2015 Supp. 20-1a13. These are just a few of the many ways in which the Legislature has regulated judicial administration and procedure.

Another example is the Judicial Department Reform Act of 1965, which predates the 1972 constitutional amendment giving the Supreme Court general administrative authority. This Act required the Supreme Court to set up judicial departments, created the position of judicial administrator, and specified the powers and duties of the departmental justices and the judicial administrator. L. 1965, ch. 215 (codified at K.S.A. 20-318 *et seq.*). Following the 1972 constitutional amendment, the Legislature did not repeal the Act on the ground that it exceeded legislative authority in light of the constitutional

amendment. To the contrary, in legislation evidently designed to *implement* the constitutional amendment, the Legislature *revised* the Act along with numerous other statutes governing the judiciary. *See* L. 1976, ch. 146.

This roughly contemporaneous evidence demonstrates that the 1972 grant of general administrative authority to the Kansas Supreme Court did not *extinguish* the Legislature's legislative power in the area of court administration and procedure any more than the 1966 constitutional amendment granting the State Board of Education "general supervision" of public schools extinguished the Legislature's power to govern public education. *See NEA-Fort Scott v. USD 234*, 225 Kan. 607, 612 (1979) (holding that Article VI, § 2, of the Kansas Constitution does not "exhaust[] legislative powers on all subjects related to the field of public education"). In fact, the legislative history of the constitutional amendment revising Article III indicates that proponents of the amendment believed the Legislature would continue to have power to adopt statutes governing the Judicial Branch. *See* Appendix 3, Minutes of the House Judiciary Committee (Feb. 8, 1972) (references by the President of the District Court Judges and the Judicial Administrator to implementing legislation).

B. *State v. Mitchell* Does Not Require the Invalidation of HB 2338, § 11.

In arguing that HB 2338, § 11, violates Article III, § 1, of the Kansas Constitution, Chief Judge Solomon relies heavily on this Court's decision in *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1 (1983). *Mitchell* involved a challenge to the jury selection procedures specified in K.S.A. 22-3411a on the basis that the statute allegedly violated the separation of powers. The Kansas Supreme Court rejected this challenge, distinguishing between the traditional concept of judicial power, *i.e.*, the power to hear

and decide cases and controversies, and the Supreme Court's "general administrative authority" to "promulgate and enforce reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice." *Id*. at 194. The former is vested exclusively in the courts and "cannot be delegated to a nonjudicial body or person." *Id*. at 195.

But the "rulemaking authority over administration and procedure" is not exclusive and may be exercised by the Legislature, at least when the courts acquiesce. *Id*. The Supreme Court went on to observe, in a statement not relevant to the case, that when a court rule and a statute conflict, the court rule "must prevail." *Id*. This statement is the crux of Chief Judge Solomon's legal argument here.

The problem is, this statement in *Mitchell* was both dictum and plainly inaccurate as a matter of law. *See Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 862, 137 P.3d 486 (2006) (describing dicta as statements of law unnecessary to the decision of the case). *Mitchell* did not involve a conflict between a statute and a court rule, and so a categorical assertion of what would happen in such a situation was unnecessary to the decision. As dictum, this statement "is not binding, even on the court itself, because the court should consider the issue in light of the briefs and arguments of counsel when the question is squarely presented for decision." *State v. Cummings*, 297 Kan. 716, 725-26, 305 P.3d 556 (2013).

The District Court concluded *Mitchell*'s statement about a conflict between a Supreme Court rule and a statute passed by the Legislature was binding law because the analytical framework was, in the District Court's view, "essential to the court's decision." Vol. II at 137. The State disagrees. In *Mitchell*, the Court held that whenever the Supreme

Court agrees as a policy matter with a statute governing judicial administration, the statute is constitutional. Even if this premise were true (and the State maintains that it is not), it was unnecessary for the Court to address the *opposite* situation—a *conflict* between a court rule and a statute—which was not present in the case. Nor does *Mitchell*'s statement that court rules "must prevail" over a conflicting statute necessarily or inevitably follow from the Court's holding in that case. Instead, the settled constitutional approach is to analyze statutes regulating or addressing the Judicial Branch under the traditional Kansas four-factor separation of powers test. Under that analysis, a statute governing the judiciary is valid unless it substantially interferes with the Supreme Court's general administrative authority.

The District Court ultimately stated that *Mitchell* was only the beginning of its inquiry and, in light of subsequent separation of powers cases, stood merely for the proposition that "the Legislature does *not* enjoy supreme power over areas of court administration." Vol. II at 137. The State does not dispute that general proposition, but the fact the Legislature lacks "supreme power" over court administration does not mean that it lacks *any* power. The District Court read *Mitchell* very broadly to exclude any exercise of legislative power in the area of court administration and procedure unless the Court acquiesces in such action, relying on its statement that a court rule "must prevail" over a conflicting statute in its analysis of peer selection in surrounding states. *See* Vol. II at 151 ("[T]he Defendant offers no evidence that the legislatures of these surrounding states adopted peer selection of chief district court judges 'in the teeth of a Supreme Court rule'. . . . This point is important."). *Mitchell* therefore tainted the District Court's analysis under the proper separation of powers test.

C. If the Statement in *Mitchell* Was Not Dicta, Then that Aspect of *Mitchell* Must Be Overruled.

If this Court concludes that *Mitchell*'s statement that a court rule "must prevail" over a conflicting statute was in fact part of the holding, then that aspect of *Mitchell* should be overruled. Given *Mitchell*'s ultimate conclusion that the Legislature had authority to enact a statute governing jury selection, it is clear that authority to regulate court administration and procedure is not vested *exclusively* in the Kansas Supreme Court as Chief Judge Solomon claims; at least some of this authority is within the scope of the "legislative power" vested in the Legislature by Article II, § 1, of the Kansas Constitution. The *Mitchell* dictum's rule, as misinterpreted by the District Court, would mean that the Supreme Court could extinguish any legislative enactment governing judicial administration or procedure merely by adopting a conflicting rule that "must prevail" over the statute. In other words, many statutes would continue to exist solely as a matter of judicial grace. That assertion of judicial power is breathtaking, it is unprecedented, and it is wrong.

To conclude that the legislative power over court administration and procedure is limited to those matters "agreed upon" by the Supreme Court would raise serious separation of powers problems. In essence, it would give the Kansas Supreme Court a veto over certain legislation, a proposition found nowhere in the text or structure of the Constitution. Even more troubling, the *Mitchell* dictum would actually allow the Kansas Supreme Court to nullify previously constitutional laws. For example, the jury selection statute upheld in *Mitchell* remains on the books today. *See* K.S.A. 22-3411a. According to the *Mitchell* dictum, if the Kansas Supreme Court were to adopt a conflicting jury selection rule, the statute would suddenly become unconstitutional. Then, if the Kansas

Supreme Court later changed its mind and revoked that rule, the statute would be constitutional once again. In effect, the constitutionality of any statute governing court administration or procedure could change at any time, depending solely on the preferences of this Court at any given moment. That cannot be the law.

Of course, no one doubts that the courts have authority to conduct judicial review and invalidate laws that violate the Constitution. But in determining whether a statute is constitutional, the courts must employ a *legal* standard—something more than whether the Supreme Court agrees with the statute or would instead prefer some other rule. Judicial review is a function of the judicial power, not of the "general administrative authority" of the Supreme Court, and it is not within the judicial power to invalidate statutes on policy grounds.

D. This Court Should Apply Its Standard Separation of Powers Test Here. Doing So Demonstrates that HB 2338, § 11, Is Constitutional.

Instead of the incorrect dictum from *Mitchell*, this Court should apply its standard separation of powers test, as articulated in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84, 179 P.3d 366 (2008), to determine whether HB 2338, § 11, violates Article III, § 1, of the Kansas Constitution. Under that test, a challenged statute is presumed to be constitutional, and all doubts must be resolved in favor of its validity. *Id.* at 883-84. A statute must *clearly* violate the Constitution to be invalidated. *See State ex rel. Schneider v. Bennett*, 219 Kan. 285, 289, 547 P.2d 786 (1976).

A statute violates the separation of powers only if it *significantly interferes* with the operations of another branch. *Morrison*, 285 Kan. at 884. In determining whether a statute significantly interferes with the operations of another branch, this Court must consider four factors: "(a) the essential nature of the power being exercised; (b) the

degree of control by one [branch] over another; (c) the objective sought to be obtained . . . ; and (d) the practical result in blending of powers as shown by actual experience over a period of time." *Id.* (brackets and ellipsis in original).

Here, all four factors weigh in favor of the constitutionality of HB 2338, §11.

1. *Providing for the selection of chief district court judges is a legislative function.*

Under the first factor, HB 2338, § 11, is an exercise of the "legislative power" vested in the Legislature by Article II of the Kansas Constitution. In fact, Article II, § 18, *explicitly* grants the Legislature authority to determine how public officers are selected: "The legislature may provide for the election or appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution." Judges are "officers" for purposes of the Constitution, as evidenced by the text of Article IV, § 3, which provides that "all elected public officials in the state, except judicial *officers*" are subject to recall. (Emphasis added). Because no provision of the Constitution specifies how chief judges are to be selected, this determination is left to the Legislature under Article II, § 18. The "general administrative authority" granted to the Supreme Court in Article III, § 1 does not provide the Court with the unrivaled authority to select chief district court judges to the exclusion of the operation of Article II, § 18.

As this Court explained in *Leek v. Theis*, 217 Kan. 784 (1975), the "creation of various offices and departments of government not otherwise provided for in the Kansas Constitution is a legislative function. It is also a legislative function to determine the qualifications of the officers and by whom they shall be appointed and in what manner they shall be appointed." *Id*. at 808. For example, the Legislature created the Court of Appeals and has authority to determine how Court of Appeals judges are selected. *See*

K.S.A. 20-3001; L. 2013, ch. 1, § 1 (codified at K.S.A. 20-3020) (providing for gubernatorial appointment and Senate confirmation). Likewise, the Legislature created the position of chief district court judge, *see* L. 1968, ch. 385, § 34 (codified at K.S.A. 20-329), originally called an "administrative judge," and thus has authority to determine the method of selection for chief judges.

The District Court held that Article II, § 18, does not resolve this matter because (in the District Court's view) the position of chief judge is not a separate office from that of a district court judge, and the selection of district court judges is provided for in the Constitution. But as the District Court noted, this interpretation is undermined by the fact that the position of Chief Justice of the Supreme Court *is* its own office. *See* Vol. II at 146 n.5; Kan. Const. art. III, § 2 ("The justice who is senior in continuous term of service shall be chief justice . . . . A justice may decline or resign from the *office* of chief justice without resigning from the court. . . . During incapacity of a chief justice, the duties, powers and emoluments *of the office* shall devolve upon the justice who is next senior in continuous service." (emphasis added)).

While the duties of a chief district court judge are of course different from those of the Chief Justice, the fact that the Chief Justice position is a separate office above and beyond that of a Supreme Court Justice is compelling evidence that the chief judge position is a separate office above and beyond that of a district court judge. Like the Chief Justice, a chief judge has duties in addition to that person's duties as a district court judge and receives additional compensation for performing those duties. *See* K.S.A. 20-329; 75-3120g.

Even if Article II, § 18, did not exist, determining the method of selection for chief district court judges would be a legislative function. The U.S. Supreme Court has held that "Congress has undoubted power to regulate the practice and procedure of federal courts." *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). This authority comes from that fact that Article I of the U.S. Constitution vests the federal legislative power in Congress, just as Article II of the Kansas Constitution vests the state legislative power in the Legislature. Like Congress, the Kansas Legislature can use its legislative power to regulate the judicial system, and it has done so in numerous ways.

The history of the chief judge selection statute is instructive. In 1968, the Legislature originally created the position of chief district court judge (then called an "administrative judge") and specified that these judges would be selected by the Supreme Court. S*ee* L. 1968, ch. 385, § 34. There was no source of authority for this statute other than the "legislative power" vested in the Legislature by Article II. It is clear, then, that providing for the selection of chief district court judges was at least originally part of the legislative power. As a result, Chief Judge Solomon can prevail only by demonstrating that the 1972 constitutional amendment granting the Supreme Court "general administrative authority over all courts in this state" stripped the Legislature of this power. This he cannot do.

In considering the meaning of the 1972 constitutional amendment, the key word is "administrative"—the Supreme Court is responsible for administering the court system, much as an executive branch agency head is responsible for administering that agency. A grant of administrative authority does not, however, deprive the Legislature of the legislative power to pass laws governing that administration or establishing other officers.

The relationship between the Executive Branch and the Legislature helps illustrate this point. The Kansas Constitution grants the Governor "supreme executive power," Article I, § 3, a term that certainly seems broader than the "general administrative authority" granted to the Supreme Court. And so the Governor may regulate the Executive Branch by issuing executive orders or directing executive officials to perform certain tasks. But this administration must be carried out within the bounds of law, including statutes that do not violate the separation of powers. There is no credible *Mitchell*-like claim that the Governor's exercise of supreme executive power "must prevail" over a duly enacted statute related to the structure, administration, or operation of the Executive Branch or its officers or agencies.

The Legislature relies on its legislative power to regulate the Executive Branch in numerous ways, including by providing for the selection of executive branch officials. To give an example particularly analogous here, the Legislature has specified that the chairpersons of various administrative boards and commissions are to be chosen by their peers, not by the Governor. *See, e.g.*, K.S.A. 65-6102 (Emergency Medical Services Board); K.S.A. 74-601 (Kansas Corporation Commission); K.S.A. 74-4202 (Kansas Real Estate Commission). There has been no suggestion that such a procedure violates the separation of powers. If the Legislature can regulate and adopt procedures for gubernatorial appointments to Executive Branch positions without infringing on the Governor's "supreme executive power," it is impossible to see why it would not also have legislative power to provide for the peer selection of chief district court judges, an analogous situation.

The District Court rejected the analogy to the Executive Branch because this Court, in *State v. Dawson*, 86 Kan. 180, 119 P. 360 (1911), held that the term "supreme executive power" has never "been precisely defined" and must be exercised "within the limitations prescribed by the constitution and statutes enacted in harmony with that instrument." *Id.* at 188-89. The District Court attempted to distinguish the Governor's supreme executive power from the Supreme Court's general administrative authority by nothing that the latter is "constitutionally *explicit*." Vol. II at 146. That misses the point; the Governor's supreme executive power is also explicitly mentioned in the Constitution. But neither the Governor nor the Supreme Court is explicitly granted authority to choose subordinate officials or judges. To the contrary, the Constitution vests that *explicit* authority in the Legislature.

To be sure, the Legislature cannot actually administer the "courts" (the actual term used in Article III, not "judges") any more than it can administer executive agencies. *See State ex rel. Schneider v. Bennett*, 219 Kan. 285, 298, 547 P.2d 786 (1976) (holding that a law giving the State Finance Council, a predominately legislative body, control over day-to-day operations of the Department of Administration was an unconstitutional usurpation of executive power by the Legislature). There is a fundamental and constitutionally critical distinction between *administrative* authority and *legislative* power to govern administration. While the Legislature lacks the former (except with respect to Legislative Branch personnel), the latter is within the Legislature's purview so long as the Legislature does not significantly interfere with the operations of another branch.

The peer selection of chief district court judges does not prevent the Supreme Court from exercising its general administrative authority. Chief district court judges are

not surrogates or agents of the Supreme Court, contrary to the District Court's conclusion. *See* Vol. II at 143 ("Put another way, the position of chief district court judge is one of the principal instruments through which the Kansas Supreme Court's constitutionally-granted 'general administrative authority' over the courts in Kansas is wielded."). Indeed, judicial independence in the lower courts could be threatened if the Kansas Constitution authorized the Supreme Court to "administer" those courts with an iron fist. Instead, this Court's administrative authority is only "general" in nature. Chief district court judges do not "wield[] the supreme court's administrative powers," *see* Vol. II at 147, when they make specific administrative decisions for their district courts.

The State does not question that the Supreme Court must have *some* administrative control over chief district court judges as it does over all judges. But the Legislature preserved the Supreme Court's general administrative authority when it adopted peer selection. Chief judges remain "subject to supervision" by the Supreme Court, and their exercise of clerical and administrative functions must comply with Supreme Court rules. *See* K.S.A. 20-328. The Supreme Court also retains the authority to discipline, suspend, or remove chief judges for cause under Article III, § 15, of the Kansas Constitution.

The District Court erred in concluding that these controls were insufficient because the Supreme Court may want to remove a chief judge for reasons other than "for cause" under the Kansas Constitution.[1] Again, an analogy to the Executive Branch (this time at the federal level) is instructive. The U.S. Supreme Court has held that the federal

[1] The term "for cause" is not defined in the Constitution and would therefore seem to grant wide latitude to the Supreme Court. The Court could, for example, conclude that a chief district court judge's refusal to follow a directive from the Court, issued pursuant to the Court's general administrative authority, constitutes cause for removal as chief judge.

Constitution gives the President "general administrative control of those executing the laws," *Myers v. United States*, 272 U.S. 52, 163-64 (1926); *see also Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-93 (2010), a phrase that bears a remarkable similarity to the Kansas Supreme Court's "general administrative authority" over the court system. Yet the U.S. Supreme Court also has held that a "for good-cause" restriction on the President's removal authority does not unconstitutionality infringe on the President's general administrative control, even as applied to purely executive officers. *See Morrison v. Olson*, 487 U.S. 654, 689-91 (1988); *see also Free Enterprise Fund*, 561 U.S. at 494-95 ("[In *Morrison*] [w]e recognized that the independent counsel was undoubtedly an executive officer, rather than 'quasi-legislative' or 'quasi-judicial,' but we stated as 'our present considered view' that Congress had power to impose good-cause restrictions on her removal.").

Likewise, this Court should hold that peer selection of chief district court judges does not substantially interfere with the Court's general administrative authority when those chief judges remain subject to supervision by the Supreme Court and are removable for cause.

2. HB 2338, § 11, does not grant the Legislature any role in selecting chief judges.

The second factor in the separation of powers analysis is the degree of control one branch exercises over another. This factor, too, favors the State. HB 2338, § 11, does not represent a case of legislative aggrandizement at the expense of the Judicial Branch; it gives neither the Legislature nor the Governor *any* role in the actual selection of the chief judges. The bill simply modified *who within the Judicial Branch* selects chief judges.

And, as noted above, the law preserves the Kansas Supreme Court's ability to supervise and remove chief judges for cause.

The District Court held that this factor favors Chief Judge Solomon because "the Legislature—while not directly wielding the power to choose [chief district court judges] itself—is, in fact, exerting itself over the Judiciary: it has chosen *who chooses* chief district court judges." Vol. II at 148. But that is nothing new. Even prior to HB 2338, the Legislature specified how chief district court judges were to be chosen. *See* K.S.A. 2013 Supp. 20-329 (providing for selection by the Supreme Court). In fact, K.S.A. 20-329 predates Kansas Supreme Court Rule 107, which merely reflects the selection method formerly specified by the Legislature. Amending K.S.A. 20-329 to provide for peer selection did not increase the Legislature's control over the Judicial Branch.

3. HB 2338, § 11, serves worthy objectives.

The State and Chief Judge Solomon appeared to agree below that the third factor in the separation of powers test—the objective sought to be obtained—was the least important, and the District Court likewise "afford[ed] little weight to this element of the analysis." Vol. II at 149.

To the extent the third factor is relevant, though, it too favors the State. The State provided legislative history indicating that the practice of peer selection in other states may have motivated the Legislature to adopt it here. Vol. I at 23, 30-35 (Memorandum from Senator Jeff King). The Legislature also likely was influenced by the testimony of several district court judges in support of peer selection. *See* Vol. I at 36-39 (Written Testimony of the Honorable Eric R. Yost, District Judge, 18th Judicial District, before the Kansas Senate Judiciary Committee in support of SB 364 and 365 (Feb. 17, 2014));

id. at 40-41 (Written Testimony of Three 18th Judicial District Judges in support of SB 365 (Feb. 17, 2014)). These judges argued that chief judges should be selected by their peers, who know them best and work with them most closely. They also noted that peer selection is how the Legislature, city and county commissions, and school boards choose their leadership.

At oral argument in the District Court, Chief Judge Solomon's counsel dismissed the analogy to peer selection in state and local legislative bodies, arguing a more appropriate analogy is that of schoolchildren and their principals. Vol. III, Oral Argument Transcript at 39 ("It's as if . . . in school, if children get to choose their principal."). At other points Chief Judge Solomon's counsel derisively analogized peer selection to military contexts, arguing that it would be inappropriate to have privates selecting their sergeant, or generals selecting their commander-in-chief. *Id.* But the Legislature evidentially did not share Chief Judge Solomon's view of his fellow district court judges as school "children" in need of his supervision. Instead, the Legislature believed that district court judges are fundamentally equal and are more than capable of deciding who should serve as their chief judge. That is certainly a reasonable policy decision.

Before the District Court, Chief Judge Solomon offered *no* evidence that HB 2338, § 11, was motivated by any pernicious objective. Chief Judge Solomon did attempt to argue that 2015 House Bill 2005—passed a year after HB 2338—is somehow relevant to the inquiry. But while Chief Judge Solomon alleges that the Legislature was motivated by improper objectives in passing *2015 House Bill 2005*, that bill sheds no light on the Legislature's objectives in providing for the peer selection of chief district court judges in HB 2338. In any event, 2015 House Bill 2005 (codified at K.S.A. 2015 Supp. 20-1a18) is

enjoined in a separate lawsuit filed by the Attorney General and has no bearing on the issues in this case.

The only evidence in the record indicates that the Legislature was motivated by reasonable and proper objectives in passing HB 2338. Accordingly, to the extent this factor is relevant, it too demonstrates that HB 2338, § 11, does not unconstitutionality infringe on the Kansas Supreme Court's general administrative authority.

4. Practical experience demonstrates that HB 2338, § 11, will not substantially interfere with the Kansas Supreme Court's general administrative authority.

The State presented evidence of practical experience in Kansas, surrounding states, and at the federal level to demonstrate both that peer selection of chief judges is common and that HB 2338, § 11, will not substantially interfere with the Kansas Supreme Court's general administrative authority. The District Court did not address the evidence from Kansas or under the federal system, and it rejected the importance of evidence from surrounding states by improperly falling back on the *Mitchell* dictum and wholly avoiding the separation of powers analysis under *Morrison*.

The legislative history of HB 2338 indicates that peer selection of chief district court judges already was the *de facto* practice in the State's two largest counties—Johnson and Sedgwick. *See* Vol. I at 37-38. In these two districts, the district court judges informally select a chief judge, and only their chosen candidate applies to the Supreme Court for the position. *Id.* To be sure, there remains a possibility that the Supreme Court could reject the judge chosen by the judge's peers and appoint another judge instead, but there is no evidence that has ever happened. Thus, the fear that peer selection will leave

the Kansas Supreme Court unable to exercise its general administrative authority is simply not borne out by practice and experience.

The State also pointed out that under the federal system, Congress, not the Supreme Court, has specified how chief judges of federal district courts and federal courts of appeal are chosen. *See* 28 U.S.C. § 45 (courts of appeals); 28 U.S.C. § 136 (district courts). Although federal chief judges are not chosen by their peers, they also are not appointed by the U.S. Supreme Court, and instead are chosen in a manner that Congress has directed. This further undermines any claim that chief judges must be selected by the highest court in a judicial system in order to preserve the separation of powers and judicial independence.

Finally, the State pointed out that peer selection of chief judges (sometimes called "presiding judges") is the practice in three surrounding states—Nebraska, Missouri, and Oklahoma. *See* Neb. Rev. Stat. § 24-1101(2) (Nebraska Court of Appeals chief judge chosen by peers, with Supreme Court approval); Neb. Ct. R. § 6-1502 (peer selection of presiding judge within each district court division); Neb. Rev. Stat. § 24-506 (peer selection of presiding judges within Nebraska county courts); Mo. Const. art. V, § 8 (peer selection of chief judge in each court of appeals district); Mo. Ann. Stat. § 478.240 (peer selection of presiding judge in each circuit (trial) court); Okla. Stat. Ann. tit. 20, § 35 (peer selection of presiding judge in the Oklahoma Court of Criminal Appeals—the highest court for criminal appeals in Oklahoma); Okla. Stat. Ann. tit. 20, § 30.2 (peer selection of presiding judge for each division of the Oklahoma Court of Civil Appeals); Okla. Const. art. VII, § 10 (peer selection of presiding judge in each judicial district).

Each of these states has a constitutional provision similar to the Kansas Article III provision; all three of these three sister states give general administrative or supervisory authority to their supreme courts. *See* Neb. Const. art. V., § 1 ("In accordance with rules established by the Supreme Court and not in conflict with other provisions of this Constitution and laws governing such matters, general administrative authority over all courts in this state shall be vested in the Supreme Court and shall be exercised by the Chief Justice."); Mo. Const. art. V, § 4 ("The supreme court shall have general superintending control over all courts and tribunals. . . . Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power."); Okla. Const. art. VII, § 6 ("[G]eneral administrative authority over all courts in this State . . . is hereby vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules."). There is *no* evidence that in these states, peer selection of chief judges has interfered with the supreme court's administrative authority, much less significantly so.

The District Court dismissed this point by relying on the *Mitchell* dictum, and speculating that the supreme courts in these sister states may have acquiesced in peer selection. However, acquiescence is not sufficient to save an otherwise unconstitutional law, nor is the Kansas Supreme Court's mere policy disagreement sufficient to conclude a law governing judicial administration is unconstitutional. In any event, regardless of how or by whom the system of peer selection was established, the fact that several neighbor states utilize the peer selection of chief judges demonstrates that peer selection does not significantly interfere with the general administrative authority of state supreme

courts. Neither Chief Judge Solomon nor the district court has explained why the situation would be radically different in Kansas.

In the end, HB 2338, § 11, is a proper exercise of Article II "legislative" authority. Applying the four-factor analysis articulated in *Morrison* compels the conclusion that HB 2338, § 11 does not violate the separation of powers and, thus, is constitutional.

CONCLUSION

This matter should be dismissed for lack of subject matter jurisdiction. Chief Judge Solomon has not suffered an injury in fact sufficient to establish standing, nor is the matter ripe for review.

HB 2338, § 11, is a valid exercise of the Legislature's legislative power under Article II of the Kansas Constitution and does not violate Article III, § 1. Applying the four *Morrison v. Sebeli*us factors results in these conclusions: (1) determining how chief judges are selected is a legislative power; (2) the Legislature does not exercise any control over the actual selection of chief judges; (3) peer selection is a reasonable policy choice consistent with widespread practice among the states; and (4) practical experience in Kansas, surrounding states, and the federal judiciary demonstrates that peer selection will not unconstitutionally interfere with the Kansas Supreme Court's general administrative authority.

The judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 25th day of November 2015, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were electronically mailed to:

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Appendix 1

Order Granting Temporary Injunction and Stay
State ex rel. Schmidt v. Shipman
Neosho County District Court, Sept. 22, 2015

IN THE DISTRICT COURT OF NEOSHO COUNTY, KANSAS
Sitting at Chanute

FILED
2015 SEP 22 AM 8 46
CLERK OF DISTRICT COURT
NEOSHO COUNTY, KANSAS
BY _____

STATE OF KANSAS ex rel. DEREK SCHMIDT, Attorney General of the State of Kansas,	)
Plaintiff,	)
v.	) **Case No. 2015-CV-73**
SARAH L. SHIPMAN, in her official capacity as Acting Secretary of Administration of the State of Kansas,	)
Defendant.	)

ORDER GRANTING TEMPORARY INJUNCTION AND STAY

This matter comes before the Court on the State's Motion for Temporary Injunction and Stay. After reviewing the State's Petition and Motion, as well as the statements and representations of counsel and exhibits, the Court finds and concludes as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction under the statutory and common law of Kansas, particularly K.S.A. 20-301.

2. Venue is proper under the statutory and common law of the State of Kansas because the cause of action, or some part thereof, arises in Neosho County, Kansas. *See* K.S.A. 60-602(2); 60-603(3). In any event, Defendant consents to venue in Neosho County, Kansas, and has waived any objection thereto. *See Rauscher v. St. Benedict's Coll.*, 212 Kan. 20, 23 (1973) (noting "improper venue is an affirmative defense which may be waived"); *State, Bd. of Regents, Univ. of Kansas Med. Ctr. v. Skinner*, 267 Kan. 808, 812 (1999) (same); *see also* K.S.A. 60-212(b)(3), (h).

FACTS JUDICIALLY NOTICED

3. In 2014, the Kansas Legislature passed Senate Substitute for House Bill 2338.

4. The Governor signed 2014 Sen. Sub. for HB 2338 into law as 2014 Kansas Laws ch. 82.

5. Section 11 of 2014 Sen. Sub. for HB 2338 amended K.S.A. 20-329 to permit the judges in each district to select their chief judge rather than having the Kansas Supreme Court appoint the chief judges in all districts (hereinafter, "the Chief Judge Selection Clause").

6. Section 43 of 2014 Sen. Sub. for HB 2338 enacted a "nonseverability clause" that stated: "The provisions of this act are not severable. If any provision of this act is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of such act without such stayed, invalid or unconstitutional provision." 2014 Kansas Laws Ch. 82 (Sen. Sub. for H.B. 2338) § 43 (hereinafter "the 2014 Nonseverability Clause").

7. On February 18, 2015, The Honorable Larry T. Solomon, Chief Judge of the 30th Judicial District, filed a lawsuit challenging the constitutionality of the Chief Judge Selection Clause. *Solomon v. Kansas*, Shawnee Cnty. Dist. Ct. Case No. 2015-CV-156 (*Solomon*).

8. On September 2, 2015, the district court in *Solomon* granted summary judgment to Plaintiff Chief Judge Solomon and held the Chief Judge Selection Clause was unconstitutional as a violation of the separation of powers doctrine of the Kansas Constitution. Plaintiff Chief Judge Solomon represented to the Court in his Petition that such a finding would result in a partial loss of funding for the judiciary by operation of the 2014 Nonseverability Clause. *Solomon* Pet. for Decl. J. ¶ 1. The court enforced the 2014 Nonseverability Clause and declared 2014 Sen. Sub. for HB 2338 invalid in its entirety. *Solomon* Mem. Decision & Order at 35.

9. While *Solomon* was pending but before the entry of summary judgment, the Legislature passed and the Governor signed into law 2015 House Bill 2005, which appropriates funds for the judicial branch for fiscal years 2016 and 2017. Section 29 of that bill contained a separate nonseverability clause, which stated:

> Except as provided further, the provisions of this act are not severable, nor are they severable from the provisions of 2014 Senate Substitute for House Bill No. 2338, chapter 82 of the 2014 Session Laws of Kansas. If any provision of this act or of 2014 Senate Substitute for House Bill No. 2338, chapter 82 of the 2014 Session Laws of Kansas is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of this act without such stayed, invalid or unconstitutional provision and the provisions of this act are hereby declared to be null and void and shall have no force and effect.

K.S.A. 20-1a18 (2015 HB 2005) (hereinafter, "the 2015 Nonseverability Clause").

10. The *Solomon* court declined to address the effect of its ruling on any other law, even though by operation of the 2015 Nonseverability Clause the invalidation of § 11 also arguably invalidates the entirety of 2015 HB 2005 and all judicial funding for fiscal years 2016 and 2017.

11. To avoid the risk of loss of all judicial branch funding that the court's decision in *Solomon* has triggered, the State sought (with support of Plaintiff Chief Judge Solomon), and the district court granted, a stay of the judgment pending the State's appeal of the decision. The State filed its notice of appeal on September 18, 2015.

12. In the present action, the Attorney General claims in Count I a potential violation of Article 3, § 13, of the Kansas Constitution. The Attorney General asserts an additional claim, Count II, based on potential harm the 2015 Nonseverability Clause could cause to his ability to perform his duties as Attorney General.

13. Because the district court in *Solomon* held unconstitutional the Chief Judge Selection Clause of 2014 Sen. Sub. for HB 2338, under 2015 HB 2005 there is an ever-present threat that judicial branch funding could be cut off before the Legislature returns for its next session.

14. Under Article 2, § 8, of the Kansas Constitution, the Legislature will next convene in regular session on January 11, 2016.

15. The Attorney General filed the present action on September 21, 2015, "to avoid any reduction of judicial salaries in violation of Article 3, § 13, of the Kansas Constitution, and to ensure the Kansas courts remain open and operating." Petition, ¶ 1.

FINDINGS OF FACT

16. Key legislators have indicated that the Legislature did not intend through enactment of the 2015 Nonseverability Clause to eliminate funding for the judicial branch of state government. Nor did the Governor, who signed 2015 House Bill 2005 into law. None of the parties to this suit desire that outcome either. Thus, there appears to be a unanimous desire by all involved that the 2015 Nonseverability Clause should not operate to eliminate judicial branch funding. *See, e.g.*, Ex. A to State's Petition.

17. If the 2015 Nonseverability Clause were given effect, and if any condition precedent that triggers it has occurred or occurs, the result would be immediate elimination of all judicial branch funding. If that were to occur while the Legislature is unable to immediately address the need for judicial funding because it is not in session, the 2015 Nonseverability Clause would require the State of Kansas, acting *inter alia* through Defendant Secretary of Administration, to cut off all funding to the judicial branch.

18. Such a result would necessarily and unavoidably violate Article 3, § 13, by unconstitutionally reducing judicial salaries. It also would prevent the Attorney General from performing his duties, including here in Neosho County.

19. If the Legislature were in session at the time the 2015 Nonseverability Clause is triggered, a constitutional violation would not necessarily result because the Legislature could avoid the violation by immediately addressing judicial funding and thereby prevent an unconstitutional reduction in judicial salaries.

20. It is the operation of the 2015 Nonseverability Clause in a manner that causes elimination of judicial branch funding for 2016 and 2017, not the existence of the clause itself, that threatens the constitutional harm. Although the district court's decision in *Solomon* is currently stayed by agreement of the parties, the stay could be lifted at any time, thus rendering the 2015 Nonseverability Clause operable unless it is enjoined by the court or modified by the Legislature.

21. Entry of the requested temporary injunction prevents any violation of Article 3, § 13, until at least March 15, 2016, by rendering the 2015 Nonseverability Clause inoperable until that date. Assertion of any constitutional violation after March 15, 2016, would be speculative at this time because it necessarily assumes action (or inaction) by the Legislature that has not yet occurred; thus, a stay of this action until that date is appropriate.

22. Defendant Secretary of Administration consents and agrees to entry of the temporary injunction and stay requested by the Attorney General.

CONCLUSIONS OF LAW—TEMPORARY INJUNCTION

23. Kansas law requires a five-step analysis to determine whether a temporary injunction should be ordered: (1) substantial likelihood of success on the merits, (2) reasonable

probability of irreparable future injury to the movant; (3) an action at law will not provide an adequate remedy; (4) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (5) the injunction, if issued, would not be adverse to the public interest. *See Steffes v. City of Lawrence*, 284 Kan. 380, 394-95 (2007); *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462 (1986).

24. If operation of the 2015 Nonseverability Clause were to result in elimination of all judicial branch funding for 2016 and 2017, then judicial salaries necessarily would be reduced in violation of Article 3, § 13. Moreover, the elimination of judicial branch funding would substantially disrupt the operation of the Kansas court system, thereby preventing the Attorney General from performing certain of his duties as required by law. Thus, the Plaintiff State of Kansas has a substantial likelihood of success on the merits.

25. If operation of the 2015 Nonseverability Clause were to result in elimination of all judicial branch funding for 2016 and 2017, then the resulting violation of Article 3, § 13, would constitute irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) (noting that loss of constitutional freedoms "for even minimal periods of time, unquestionably constitutes irreparable injury") (quoted in *Raven Dev. Co. v. Bd. of Cnty. Comm'rs of Shawnee Cnty.*, No. 01C 1306, 2001 WL 34117820, at *5 (Kan. Dist. Ct. Nov. 1, 2001)); *Adams By & Through Adams v. Baker*, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (noting that "deprivation of a constitutional right is, itself, irreparable harm"); 11A Charles Alan Wright & Arthur A. Miller, Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary.") Because the State has an interest in its Constitution being enforced, an Article 3, § 13 violation would irreparably harm the State.

Moreover, the Attorney General, as the State's chief law enforcement official, has authority to seek judicial relief from constitutional violations. *See, e.g.*, *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 879 (2008). The elimination of judicial branch funding would cause irreparable harm to the Attorney General by rendering him unable to perform his legally required duties for an unspecified period of time. Thus, there is a reasonable probability of irreparable future injury to the Plaintiff.

26. No action at law would provide an adequate remedy if operation of the 2015 Nonseverability Clause were to result in elimination of all judicial branch funding for 2016 and 2017.

27. The threatened injury to Plaintiff State of Kansas if operation of the 2015 Nonseverability Clause were to result in elimination of all judicial branch funding for 2016 and 2017 plainly outweighs whatever damage the proposed injunction may cause the opposing party. Indeed, Defendant Secretary of Administration consents to entry of this temporary injunction, and as discussed above there appears to be a unanimous desire by all involved that the 2015 Nonseverability Clause should not operate to eliminate judicial branch funding. *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (concluding that balance of equities favored applicant for stay where applicants demonstrated a "threat of harm" and respondents did "not allege[] any harm").

28. Issuance of this temporary injunction would not be adverse to the public interest but instead would vindicate the public interest. The public interest strongly favors avoiding violation of the Kansas Constitution, ensuring the Attorney General is able to perform his duties as required by law, and preventing a shutdown of the judicial branch of state government that

would occur if operation of the 2015 Nonseverability Clause were to result in elimination of all judicial branch funding for 2016 and 2017.

29. The requested temporary injunction avoids these harms by preventing any operation of the 2015 Nonseverability Clause, including any operation that would result in elimination of all judicial branch funding for 2016 and 2017, until March 15, 2016, a time when the Legislature will have returned to session.

30. The requested temporary injunction benefits both the parties and the public by allowing the Legislature an opportunity to revisit the 2015 Nonseverability Clause or, in the alternative, to promptly address the constitutional requirement for judicial funding in the event operation of the 2015 Nonseverability Clause would result in elimination of all judicial branch funding for 2016 and 2017 that has previously been approved. Thus, the temporary injunction should be granted.

31. Because the temporary injunction prohibits the *parties*—both the State of Kansas and its Secretary of Administration—from giving effect to the 2015 Nonseverability Clause, the effect of this injunction is to prevent operation of the 2015 Nonseverability Clause throughout the State of Kansas.

CONCLUSIONS OF LAW—STAY

32. This court has inherent authority to stay proceedings. *See Harsch v. Miller*, 200 P.3d 467, 475 (Kan. 2009) (noting "'the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants'" (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936))); *see also, e.g.*, *Montoy v. State*, No. 99-C-1738, 2003 WL 22902963, at *50 (Kan. Dist. Ct. Dec. 2, 2003) (withholding for seven months final order and judgment finding that

school funding scheme violated Article 6 of the Kansas Constitution to give the Legislature time to act); *Montoy v. State*, 120 P.3d 306, 310 (2005) (withholding for four months formal opinion finding that the Legislature had failed to make suitable provisions for finance of public school system to give the Legislature time to act).

33. The entry of the temporary injunction renders the 2015 Nonseverability Clause wholly inoperable throughout the State until March 15, 2016. Because the Legislature will have reconvened in regular session prior to that date, entry of the temporary injunction eliminates the certainty that operation of the 2015 Nonseverability Clause will result in elimination of all judicial branch funding for 2016 and 2017 because it will be possible for the Legislature either to revisit the 2015 Nonseverability Clause or to respond immediately to prevent any elimination of judicial branch funding that would otherwise result from its operation. Thus, any asserted harm from the existence of the 2015 Nonseverability Clause is rendered purely speculative until at least March 15, 2016.

34. The parties agree that these proceedings should be stayed until March 15, 2016.

35. For the foregoing reasons, a stay of these proceedings is warranted.

IT IS THEREFORE ORDERED AND DECREED THAT

A. All parties to this suit are enjoined from giving effect to the 2015 Nonseverability Clause, as defined in paragraph 9, above, until and through March 15, 2016.

B. Any further proceedings in this case are stayed until and through March 15, 2016, or until further order of the court.

C. On or before March 15, 2016, the parties shall file a status report with the Court regarding the need for further proceedings.

IT IS SO ORDERED.

Daryl D. Ahlquist, District Judge
District Court of Neosho County, Kansas
Chanute Division
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Certificate of Clerk of the District Court, The above is a true and correct copy of the original instrument filed on the 22nd day of Sept. 2015 and recorded in the Court of the 31st Judicial District Neosho County, Kansas, Dated this 22nd day Of Sept. 2015.

Nicky Lawless Clerk

SEAL OF DISTRICT COURT NEOSHO CO., KANSAS

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Appendix 2

District Court Opinion in
KNEA v. State

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

KANSAS NATIONAL EDUCATION ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	Case No. 2014-CV-789
STATE OF KANSAS	)	
Defendant.	)	

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court upon the Motion to Dismiss filed by Defendants State of Kansas ("Defendant") and Governor Sam Brownback on September 22, 2014, and upon the Motion for Summary Judgment filed in this matter by Plaintiff Kansas National Education Association ("Plaintiff") on November 12, 2014. After the parties fully briefed these matters, the Court heard oral arguments on February 12, 2015. After due and careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

The KNEA filed its Petition on August 11, 2014. In it, the KNEA challenged the enactment of HB 2506, which was passed by the Kansas Legislature on April 6, 2014, and signed into law by Governor Brownback on April 22, 2014. Specifically, the KNEA took issue with what it termed, "The Teacher Dismissal Provisions" in the bill, identified as HB §§ 48–54. The KNEA challenged the bill as a whole under the one subject rule of the Kansas Constitution, art. 2, § 16, because, "The Teacher Dismissal Provisions are wholly unrelated to appropriations." The KNEA sought a declaratory judgment finding that 1) "the Teacher Dismissal Provisions of

HB 2506 violate Article 2, Section 16 of the Kansas Constitution," 2) "the Teacher Dismissal Provisions of HB 2506 are severable from the remaining provisions of HB 2506," and 3) "the Teacher Dismissal Provisions of HB 2506 are void and have no legal effect." The Petition also sought a permanent injunction "preventing implementing and/or enforcement of the Teacher Dismissal Provisions of HB 2506," in addition to an award of attorney's fees.

In lieu of an Answer, the State filed the present Motion to Dismiss on September 22, 2014, along with an accompanying Memorandum and a list of indexed exhibits. Principally, this Motion attacks the KNEA's standing to bring this action and the ripeness of the case, generally asserts that HB 2506 actually does encompass a single subject (education), and finally argues that, even if the bill did violate the single subject rule, Kan. Const. Art. 2, § 16, the entire act must be stricken—not merely the sections which draw the KNEA's ire.

In response, KNEA filed a Motion for Summary Judgment on November 12, 2014, along with a Memorandum and a number of accompanying exhibits. KNEA's Memorandum of law addressed both the State's Motion to Dismiss and its own Motion for Summary Judgment. The State then filed a combined response to KNEA's Motion for Summary Judgment and a reply in further support of its own Motion to Dismiss on January 16, 2015, which KNEA responded to on February 3, 2015. Throughout these filings, both parties argued as to whether or not Governor Brownback was a proper defendant in this matter.

Subsequently, this Court heard oral arguments on the matter on February 12, 2015. At arguments, the parties agreed to dismiss Governor Brownback as a named defendant in the case, and this Court entered an Order dismissing the Governor on February 23, 2015.

STATEMENT OF FACTS

1. On March 7, 2014, the Kansas Supreme Court issued the ruling in *Gannon v. State*, 298

Kan. 1107, 319 P.3d 1196 (2014).

2. According to the legislative record, HB 2506 began as a one-page "noncontroversial" bill repealing an outdated sunset provision in the Midwestern Higher Education Compact Act. It passed 122-1 the Kansas House of Representatives on February 26, 2014.

3. On April 2, 2014, the Senate Committee on Ways and Means recommended that a substitute bill ("Senate substitute") be passed in place of the "noncontroversial" version of HB 2506 approved by the House. The text of this bill is properly before the Court and, where necessary, will be referenced in the discussion below.

4. The Senate substitute was a 51-page bill containing millions of dollars in appropriations to K-12 public schools and state institutions of higher learning, as well as to the Kansas Department of Children and Families and the Kansas Department of Commerce. The text of this version of the bill is properly before the Court and, where necessary, will be referenced in the discussion below.

5. Further amendments were made to the Senate substitute bill by the Senate Committee for the Whole on April 3, 2014. The text of this version of the bill is properly before the Court and, where necessary, will be referenced in the discussion below.

6. Both chambers of the Kansas Legislature passed the final version of the Senate substitute for HB 2506 on April 6, 2014. The text of the final version of the bill is properly before the Court and, where necessary, will be referenced in the discussion below.

7. Governor Brownback signed the Senate substitute for HB 2506 into law on April 21, 2014.

8. In an article published in the Wichita Eagle on April 9, 2014, Governor Brownback was quoted as saying, "Line-item veto normally only applies to appropriations. . . . It's an

appropriations bill, but the language itself is not an appropriation." While the article does not discuss Senate substitute for HB 2506 by name, the parties do not dispute that that bill is the subject of the article.

9. In its Petition Plaintiff KNEA represented that it:

> [S]erves as the state-level affiliate for 361 local education employee organizations, which represent approximately 19,800 current public school teachers in Kansas. The threefold mission of the KNEA is to promote quality public schools, strengthen the profession of teaching, and improve the well-being of KNEA members. KNEA is affiliated with the National Education Association (NEA).

10. The Petition also states that KNEA's "members" include "non-probationary teachers who have lost valuable rights due to the passage of the Teacher Dismissal Provisions."[1]

11. To date, the Plaintiff has not submitted any identifying information relating to its claimed individual teacher-members.

STANDARD OF REVIEW

I. MOTION TO DISMISS

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A motion to dismiss for lack of standing—which is a component of subject matter jurisdiction—is governed by K.S.A. 60-212(b)(1). *Cf. State v. Ernesti*, 291 Kan. 54, 60, 239 P.3d 40 (2010) (noting that "standing is a component of subject matter jurisdiction . . ."). If the Court determines that it lacks subject matter jurisdiction, the Court must dismiss the action. K.S.A. 60-212(g)(3).

[1] At oral arguments, Plaintiff's Counsel clarified that the approximately 19,800 teachers identified above are both members of the local education employee organizations which are affiliated with KNEA *and* members of the KNEA. This can also be inferred from the text of the Petition itself, as set out in this Memorandum Decision and Order's Statement of Facts nos. 9 and 10. For the purposes of this Memorandum Decision and Order, the Plaintiff's individual teachers are referred to as "teacher-members."

In adjudicating questions of subject matter jurisdiction, it is important to keep the following principles in mind:

> Subject matter jurisdiction is vested by statute or constitution and establishes the court's authority to hear and decide a particular type of action. Parties cannot confer subject matter jurisdiction upon the courts by consent, waiver, or estoppel. Parties cannot confer subject matter jurisdiction by failing to object to the court's lack of jurisdiction. If a trial court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it.

Chelf v. State, 46 Kan. App. 2d 522, 529, 263 P.3d 852 (2011). The Kansas Court of Appeals has noted that, "Typically, the party asserting subject matter jurisdiction bears the burden of proof." *Purdum v. Purdum*, 48 Kan. App. 2d 938, 994, 301 P.3d 718 (2013).

Because challenges to standing are subject matter jurisdiction challenges, the Kansas Supreme Court has also written that, "The burden to establish [the] elements of standing rests with the party asserting it." *Gannon v. State*, 298 Kan. at 1123. Furthermore:

> **[T]he nature of that burden depends on the stage of the proceedings because the elements of standing are not merely pleading requirements.** Each element must be proved in the same way as any other matter and with the degree of evidence required at the successive stages of the litigation. [Citations omitted.] So because the panel apparently waited until after the trial to dismiss some claims based on lack of standing, and the State has waited until the appeal to raise some standing arguments, the facts alleged to prove standing must be "'supported adequately by the evidence adduced at trial.'" [Citations omitted.] In these civil proceedings the preponderance of the evidence standard applies. [Citations omitted.] Under this standard the plaintiffs' evidence must show that "a fact is more probably true than not true." [Citations omitted.]

Gannon v. State, 298 Kan. at 1123–24 (emphasis added). In a pre-discovery Motion to Dismiss based on standing deficits inherent in a petition, however, the Court must review the challenged petition and draw reasonable inferences from it. See *Bd. of Cnty. Commissioners of Sumner Cnty. v. Bremby*, 286 Kan. 745, 762, 189 P.3d 494 (2008). The Kansas Supreme Court has written that:

> [W]hen a motion to dismiss for lack of personal jurisdiction is decided before trial on the basis of pleadings, affidavits, and other written materials without an evidentiary hearing, any factual disputes must be resolved in the plaintiff's favor and the plaintiff need only make a prima facie showing of jurisdiction. Standing, of course, is a question of subject matter jurisdiction, but we see no basis for an analytical distinction in how an appellate court should review a district court's order on a motion to dismiss based on standing from one regarding personal jurisdiction.

Friends of Bethany Place, Inc. v. City of Topeka, 297 Kan. 1112, 1122, 307 P.3d 1255 (2013).

B. Motions to Dismiss for Failure to State a Claim

The rules governing the Court's review of a motion to dismiss for failure to state a claim under K.S.A. 60-212(b)(6), by contrast, are markedly different. Kansas courts do not favor granting such motions. *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001). In evaluating whether a petition has failed to state a claim, a court must determine whether the petition states any valid claim for relief when viewing the alleged facts in a light most favorable to the petitioner and resolving all doubts in the petitioner's favor. *State ex rel. Slusher v. City of Leavenworth*, 279 Kan. 789, 790, 112 P.3d 131 (2005). A district court reviewing such a motion, however, cannot resolve disputes of fact. *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364 (2008). When considering a motion to dismiss for failure to state a claim,

> [A] court must accept the plaintiff's description of that which occurred, along with any inferences reasonably [to] be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself.

Halley, 271 Kan. at 656 (quoting *Ripley v. Tolbert*, 260 Kan. 491, 493, 921 P.2d 1210 (1996)).

Ultimately, dismissal is only appropriate when "the allegations of the petition clearly demonstrate petitioners do not have a claim." *Slusher*, 279 Kan. at 790. If, however, a party moving for dismissal under K.S.A. 60-212(b)(6) raises facts for the Court's consideration

beyond the face of the pleading at issue, the Court must interpret the motion as one for summary judgment. *Brown v. Ford Storage & Moving Co.*, 43 Kan. App. 2d 304, 306–07, 224 P.3d 593 (2010).

II. MOTIONS FOR SUMMARY JUDGMENT

The familiar Kansas rules regarding summary judgment are well known. A court may enter summary judgment "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Thoroughbred Associates, L.L.C. v. Kansas City Royalty Co., L.L.C.*, 297 Kan. 1193, 1204, 308 P.3d 1238 (2013) (quoting *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009)). Before granting summary judgment, a court must "resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought." *Thoroughbred Associates*, 297 Kan. at 1204. To avoid summary judgment, the nonmoving party must present evidence to establish a dispute as to a material fact; the facts involved in this dispute "must be material to the conclusive issues in the case." 297 Kan. at 1204. In other words, the nonmoving party "cannot evade summary judgment on the mere hope that some thing may develop at trial." *Essmiller v. Southwestern Bell Tel. Co.*, 215 Kan. 74, 77, 524 P.2d 767 (1974).

Summary judgment must be denied, however, where reasonable minds could differ as to the conclusions drawn from the evidence. *Thoroughbred Associates*, 297 Kan. at 1204. That said, when the nonmoving party fails to

> [M]ake a showing sufficient to establish the existence of an element essential to that party's case . . . there can be 'no genuine issue as to any material fact,' because a 'complete failure of proof concerning an essential

element of the nonmoving party's case necessarily renders all other facts immaterial.'

Eudora Dev. Co. of Kansas v. City of Eudora, 276 Kan. 626, 631–32, 78 P.3d 437 (2003) (quoting the district court decision in the instant case) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

CONCLUSIONS OF LAW

I. MOTION TO DISMISS

Because this Court has already addressed the Defendant's Motion to Dismiss in regard to Governor Brownback, the only remaining issues relate to the justiciability of the case and whether the Plaintiff has stated a valid claim for relief. The Defendant raises essentially two matters for the Court's consideration as to justiciability: first, that the Plaintiff lacks standing, and, second, that the case is not yet ripe for adjudication. Either contention, if correct, would bar further review of the case by this Court, as, once a court determines it lacks subject matter jurisdiction, it has no authority to proceed further.

A. Standing

The Court reiterates that, at this stage of the proceedings, the Plaintiff need only establish a prima facie showing of standing in order to survive the Defendant's Motion to Dismiss. See *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. at 1122. In its Motion to Dismiss, the Defendant argues that the Plaintiff's claims to standing are twice-removed, that is, the Plaintiff claimed standing because *its member organizations* claimed standing on behalf of *their members*, who were identified as teachers[2] affected by the legislation at the heart of this case. However, the Plaintiff's clarification at oral arguments—i.e., that the affected teachers are both

[2] The identities of these teachers have not been provided.

members of the KNEA and the local organizations which comprise the KNEA—comports with the representations it made in its Petition.[3] While the Defendant objects to the Plaintiff's characterization that its members are both the "affected teachers" *and* the various local education employee organizations, the Plaintiff's Petition has actually pled as much. Thus, for the purposes of adjudicating the question of the Plaintiff's standing under a motion to dismiss, the Court concludes that the Plaintiff's claim of standing is only once-removed organizational standing. Whether or not the Plaintiff's members—the purportedly affected teachers—would have individual standing, however, is another question.

Kansas courts apply a three-pronged test in analyzing whether an organization has standing to maintain a lawsuit on behalf of its members. An association possesses such standing when:

> (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members.

312 Educ. Ass'n v. U.S.D. No. 312, 273 Kan. 875, 884, 47 P.3d 383 (2002). The Defendant has not challenged either the second or third element of this test, and the Court concludes that the Plaintiff has met its prima facie burden of establishing both. See *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. at 1122. Thus, the only remaining element for the Court's consideration is whether the individual teachers who purportedly make up the KNEA's membership have standing to sue individually.

As quoted by the Defendant in its Motion, the Kansas Supreme Court recently took the occasion to lay out the elements required to establish standing in its *Gannon* decision:

[3] "KNEA has standing to sue on behalf of its *members*, many of whom are non-probationary teachers who have lost valuable rights due to the passage of the Teacher Dismissal Provisions . . . ."

> Generally, to have standing, *i.e.,* to have a right to make a legal claim or seek enforcement of a duty or right, a litigant must have a "sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy." [Citations omitted.] Under the traditional test for standing in Kansas, "'a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.'" [Citations omitted.] We have also referred to the cognizable injury as an "'injury in fact.'" [Citations omitted.] And this court occasionally cites the federal rule's standing elements that "a party must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." [Citations omitted.]
>
> As to standing's first element of establishing a cognizable injury, more particularly we have held that "a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct." [Citations omitted.] The injury must be particularized, *i.e.,* it must affect the plaintiff in a "'personal and individual way.'" [Citations omitted.] It cannot be a "'generalized grievance'" and must be more than "'merely a general interest common to all members of the public.' . . ." [Citations omitted.]

Gannon v. State, 298 Kan. at 1122–23.

Thus, the essential question is: has the Plaintiff shown that its individual teacher-members have suffered a "cognizable injury" which is particular *to* those individuals—as opposed to a general interest common to all members of the public—and which resulted from the purportedly unconstitutional passage of HB 2506? The Defendant takes exception to the Plaintiff's claim that "many" of its teacher-members have "lost valuable rights due to the passage of the Teacher Dismissal Provisions[,]" arguing that such allegations are "general, vague, conclusory[,] and entirely speculative at this juncture." The Defendant further submits that the Plaintiff's teacher-members in this case are indistinguishable from the attorney-members of the Kansas Bar Association in *Kansas Bar Ass'n v. Judges of Third Judicial Dist.*, 270 Kan. 489, 14 P.3d 1154 (2000).

For its part, the Plaintiff distinguishes *Kansas Bar Ass'n* by noting that the KBA never claimed its attorney-members were specifically injured as a result of the at-issue statutory changes. Rather, the Plaintiff suggests, the KBA merely made sweeping claims about possible harms, and the general deleterious effect the at-issue legislation would have on the public by condoning the unauthorized practice of law. See 270 Kan. at 492. Instead, the Plaintiff directs this Court to *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 49 Kan. App. 2d 354, 310 P.3d 404 (2013), *rev. denied* (Dec. 27, 2013), which, like the instant action, is a declaratory judgment case—not an action for mandamus. In distinguishing the factual posture of the case before it from that in the cases of *Kansas Bar Ass'n v. Judges of the Third Judicial Dist.*, 270 Kan. 489, *State ex rel. Stephan v. Kansas House of Representatives,* 236 Kan. 45, 687 P.2d 622 (1984), and *Bobbett v. State, ex rel. Dresher,* 10 Kan. 9 (1872), the Kansas Court of Appeals wrote:

> Unlike these three cases cited by the district court, the Plaintiffs suffered a particular harm that differed from any harm that could possibly be suffered by members of the public at large. Here, there was no claim that H.B. 2373 caused harm to the general public; the Plaintiffs only complained about the bill's impact on them specifically. Here, in contrast to the cases relied upon by the district court, the Plaintiffs asked for a declaratory judgment deeming H.B. 2373 and the transfers unconstitutional. There was nothing vague or speculative in the Plaintiffs' amended petition.

Kansas Bldg. Indus. Workers Comp. Fund v. State, 49 Kan. App. 2d at 366.

Similarly, the Plaintiff does not claim that the injury alleged in *this* case affected the general public at large. Nor does a fair reading of the complained-of provisions of HB 2506 lead to such a conclusion. Any injury stemming from the at-issue sections of HB 2506 would specifically affect school district teachers, not the general public. Thus, the Court concludes that the injury complained of by the Plaintiff's individual teacher-members as a result of the passage

of HB 2506—if, in fact, injury there was, as discussed below—was particularized to the Plaintiff's teacher-members, and not a "generalized grievance." Moreover, if the Court were to strike down part or all of HB 2506 on the merits of the case, such action would seem to fairly redress the complained of injuries, although neither party addresses this issue.

The Defendant finally notes that no private plaintiff has ever been found to have standing to challenge legislation *solely* under the single-subject rule. Doubtless the legal theory the Plaintiff has chosen to proceed on would be inapplicable to this case if the Legislature had passed two separate bills—one dealing solely with appropriations and the other solely with education and the so-called "Teacher Dismissal Provisions"—instead of one joint bill. But regardless of whether or not the Plaintiff's individual teacher-members would have had grounds for an independent constitutional challenge to HB 2506 if the bill had contained *only* the provisions that purportedly harmed them, the harm they claim to have suffered—*i.e.*, the loss of their "due process" rights—is still causally related to the passage of HB 2506. Thus, the alleged harm can be said to be "a result of" a claimed defect in the legislative process in the passage of HB 2506, such as a violation of the single subject rule. This would give the individual teacher-members standing to challenge HB 2506 under the single subject rule, if they can demonstrate an actual cognizable injury in fact.

The only remaining consideration as to whether the Plaintiff's case should be dismissed for lack of standing, then, is whether the Plaintiff's individual teacher-members *have* suffered a cognizable injury in fact as a result of HB 2506. Because this question is necessarily entwined in the Court's consideration of the ripeness of the Plaintiff's claim, the Court will defer judgment on this issue until the issue of ripeness has been resolved.

B. Ripeness

The Defendant argues that the Plaintiff's case is not ripe yet because, essentially, no teacher has actually *been* dismissed pursuant to the provisions of HB 2506. The Plaintiff counters that the harm under HB 2506 is not termination, but, rather, is the loss of the "right to fair dismissal procedures" that would otherwise occur before a teacher could be terminated. The Plaintiff likens this deprivation to the loss of tenure protections or insurance, in that all three are essentially prophylactic employee benefits: a person may never need to rely on insurance, that is, but the mere fact that the person *is* insured confers a benefit upon that individual. Under this theory, the case became ripe when HB 2506 was signed into law.

Ripeness, like standing, is an element of justiciability. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 891, 179 P.3d 366 (2008). As summarized by the Kansas Supreme Court:

> The doctrine of ripeness is "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" [Citations omitted.] To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract. [Citations omitted.] Stated yet another way, the doctrine prevents courts from being "asked to decide 'ill-defined controversies over constitutional issues,' . . . or a case which is of 'a hypothetical or abstract character.' . . ." [Citations omitted.]

State ex rel. Morrison v. Sebelius, 285 Kan. at 892. While Kansas, not federal, law determines whether or not a case is justiciable, Kansas courts may look to federal law for guidance. *Gannon v. State*, 298 Kan. at 1119.

Plaintiff claims that, prior to the enactment of HB 2506, "school district teachers who had successfully served a three-year probationary period . . . were entitled to notice of reasons for termination and an opportunity for a hearing on those reasons under the Teacher Due Process Act." Specifically, Plaintiff's Petition cites HB 2506 §§ 48–54 (the so-called "Teacher Dismissal Provisions") as the source of the harm suffered by its individual teacher-members. These

sections were effective as of May 1, 2014 (§ 68), when HB 2506 was published in the *Kansas Register*. The plain language of these provisions clearly excludes school district teachers from the protections of K.S.A. 72-5436, 72-5438, 72-5439, 72-5445, and 72-5446.[4] Moreover, HB 2506 § 53 makes clear that school district teachers are no longer protected by K.S.A. 72-5438 through 72-5443—including the new versions of K.S.A. 72-5438 and K.S.A. 72-5439, which were passed pursuant to HB §§ 51–52. While the procedural protections of K.S.A. 72-5438 through 72-5443 need not be summarized here—the language of the statutes speaks for itself—the Court finds that they were substantial employment benefits in much the same way that the tenure process[5] can be said to be an employment benefit.

To the extent that school district teachers had once been included within the procedural protections found in the previous versions of these statutes, then, they can be said to have now *lost* those same protections as a direct result of HB 2506. No teacher has apparently yet been fired under the new version of these statutes, no dismissal notice yet sent out. Yet the loss to the school district teachers is the same either way. And in that loss—the loss of procedure, different from tenure only in scope—there is a concrete, actualized injury in fact.

Thus, because the school district teachers who purportedly comprise the Plaintiff's membership have suffered an actual, cognizable harm—which became ripe for adjudication as of May 1, 2014—the Court concludes that the Plaintiff's individual teacher-members would have

[4] K.S.A. 72-5437 retains "any professional employee who is required to hold a certificate to teach in any school district" within the meaning of "teacher" as used *solely* in that section. This section's definition of "teacher" is clearly different from that found in K.S.A. 72-5436, which specifies the definition of "teacher" to be used in the *rest* of the act. Plaintiff's Petition alleges that the amended K.S.A. 72-5437, which is the sole remaining reference to school district teachers in the act, replaced the previous protections such teachers had enjoyed with merely "written notice to [a teacher to be dismissed] on or before the third Friday in May."

[5] *Cf.* Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67 (2006) (noting that tenure is designed, among other things, to, "ensur[e] a fair process prior to dismissal . . . .").

standing, on their own, to challenge the constitutionality of HB 2506. This individual standing, combined with the other uncontroverted elements noted above, confers associational standing upon the Plaintiff to pursue this action. The Court therefore concludes that the Plaintiff's claim is justiciable and, thus, that the Court has subject matter jurisdiction over it. On the issue of justiciability, then, the Defendant's Motion to Dismiss is denied.

C. Whether the Plaintiff Has Failed to State a Claim

As a threshold matter, the Court notes that the Defendant's Motion to Dismiss for failure to state a claim encompasses matters beyond those contained in the Petition. Thus, the Court must treat the Defendant's Motion as one for summary judgment. *Brown v. Ford Storage & Moving Co.*, 43 Kan. App. 2d at 306–07. Because the Court's decision ultimately turns on an interpretation of law—the material facts surrounding which are not in dispute—the implications of this distinction are immaterial.

In the present case, the Plaintiff's Petition seeks a declaratory judgment that the "Teacher Dismissal Provisions" of HB 2506 violate the single subject rule found in Article 2, § 16 of the Kansas Constitution. While it also seeks additional declaratory judgments and injunctive relief, these claims are ancillary to the underlying single subject rule theory. Thus, in determining whether the Plaintiff has stated a potential claim for declaratory relief, the Court must necessarily assess whether HB 2506 *could* be construed to unconstitutionally encompass more than one subject, taking all factual inferences in favor of the Plaintiff.

Article 2, § 16 of the Kansas Constitution reads:

> **No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of statutes. The subject of each bill shall be expressed in its title.** No law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed. **The**

> **provisions of this section shall be liberally construed to effectuate the acts of the legislature.** (Emphasis added.)

While the Court notes the admonishment to "liberally construe" this rule so as to "effectuate the acts of the legislature[,]" this was the practice of the Kansas Supreme Court long before the 1974 amendment to this section. *See* David E. Pierce, *Void Enactments of the Kansas Legislature*, 80 J. KAN. B. ASS'N 28, 32 (July/August 2011) (citing *Cashin v. State Highway Comm'n*, 137 Kan. 744, 22 P.2d 939 (1933)). Thus, while the Defendant takes great pains to distinguish pre- and post-1974 caselaw on this issue, pre-amendment caselaw still has precedential value in terms of the liberality of construction applied by the courts.

With that said, the Kansas Supreme Court has held that a legislative enactment does not run afoul of the single subject rule "unless 'invalidity is manifest.'" *Kansas One-Call Sys., Inc. v. State*, 294 Kan. 220, 227, 274 P.3d 625, 632 (2012) (quoting *KPERS v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 676, 941 P.2d 1321 (1997)). Moreover,

> Legislation is valid under Article 2, § 16 of the Kansas Constitution, so long as the provisions of the bill are "all germane to the subject expressed in the title," and will be invalidated only where "an act embraces two or more dissimilar and discordant subjects that cannot reasonably be considered as having any legitimate connection with or relationship to each other. . . ." [Citations omitted.] A bill's subject can be as comprehensive as the legislature chooses, as long as it constitutes a single subject and not several different ones. [Citations omitted.]

Kansas One-Call Sys., Inc. v. State, 294 Kan. at 227. The Kansas Supreme Court has held that the purpose of the single subject rule is to prevent "legislative abuses such as 'logrolling[,]'" which has been described as:

> [A] situation in which several legislators combine their unrelated proposals and present them as separate provisions of one bill. The bill then is able to pass by virtue of the combined votes of the separate factions. The perceived evil of this practice is that a measure can pass which, standing alone, would have been defeated.

294 Kan. at 226.

In the present case, the Legislature chose to describe HB 2506 as:

> AN ACT **concerning education; relating to the financing and instruction thereof; making and concerning appropriations for the fiscal years ending June 30, 2014, and June 30, 2015, for certain agencies**; authorizing the state board of regents to sell and convey or exchange certain real estate with the Emporia state university foundation; authorizing the state board of regents to exchange and convey certain real estate with the Kansas university endowment association; amending K.S.A. 72-1412, 75-5333b, 72-5439, 72-5446, 72-6416 and 72-8809 and K.S.A. 2013 Supp. 72-1127, 72-1925, 72-5436, 72-5437, 72-5438, 72-5445, 72-6407, 72-6410, 72-6415b, 72-6417, 72-6431, 72-6433,72-6433d, 72-6441, 72-8254, 72-8814 and 79-32,138 and repealing the existing sections; also repealing K.S.A. 2013 Supp. 72-6454. (Emphasis added.)

The extensive language of HB 2506 need not be repeated here, but the Court notes that the "certain agencies" involved in the appropriations portions of the bill include the Division of Post Audit (§ 1), the Department of Administration (§ 2), the Kansas Department for Aging and Disability Services (§ 3), the Kansas Department for Children and Families (§§ 4–5), the Department of Education (§§ 6–7), Fort Hays State University (§ 8), Kansas State University and its associated programs (§§ 9–13), Emporia State University (§§ 14–15), Pittsburg State University (§ 16), the University of Kansas and its associated programs (§§ 17–20), Wichita State University (§§ 21–22), the State Board of Regents (§§ 23–24), the State Fire Marshal (§ 25), the Kansas Highway Patrol (§ 26), and the Department of Transportation (§ 27). Much of the remainder of HB 2506 (§§ 28–64) is concerned with substantive and administrative policy changes to various education-related statutes, while the final sections address severability of the bill's provisions (§ 65), the specific statutes repealed by the bill (§§ 66–67), and a provision discussing when the bill would come into force (§ 68).

The Defendant argues that this particular situation—a purported non-appropriations bill that nevertheless contains appropriations provisions—has never been considered before under the lens of the single subject rule. Furthermore, the Defendant argues that *State ex rel. Stephan v. Carlin*, 230 Kan. 252, 631 P.2d 668 (1981), is factually off-point because, unlike the at-issue legislation in *Carlin*, the HB 2506 is not an "omnibus" appropriations bill.

Because on-point Kansas Supreme Court caselaw controls this Court's decision over any other persuasive authority, the Court must determine whether, in fact, *Carlin* is on-point. In *Carlin*, the at-issue legislation—1981 Senate Bill No. 470—was undoubtedly an omnibus appropriations bill. 230 Kan. at 252. The Attorney General filed an action in quo warranto and mandamus against Governor Carlin, arguing that his partial veto of 1981 Senate Bill No. 470 was unlawful. 230 Kan. at 252. Governor Carlin, meanwhile, argued that § 77 of Senate Bill 470 was totally unrelated to the subject of appropriations, which was otherwise the subject of the entirety of the bill, and, thus, was unconstitutional—or, in the alternative, that he could use his line item veto powers to excise it from the rest of the legislation. 230 Kan. at 252–53.

The Kansas Supreme Court presented the question as, "Is the legislature granted authority by the 1974 amendment to include in an appropriations bill, without limitation, any subject which it wishes to address? May it include therein subjects entirely foreign to appropriations?" 230 Kan. at 257. The court then answered the question in the negative, writing that:

> The inclusion of unrelated legislation in an important and extensive appropriations bill, at the end of the session, is particularly illustrative of the possible harm Section 16 is intended to prevent.
>
> Appropriation bills may direct the amounts of money which may be spent, and for what purposes; they may express the legislature's direction as to expenditures; they may transfer funds from one account to another; they may direct that prior unexpended appropriations lapse. But we hold that under Section 16 of Article 2 of the Constitution, appropriation bills may

> not include subjects wholly foreign and unrelated to their primary purpose: authorizing the expenditure of specific sums of money for specific purposes. Section 77 of Senate Bill 470 violates Section 16 of Article 2 of the Constitution, and is unconstitutional.

230 Kan. at 258.

The Defendant protests that HB 2506 is not an omnibus appropriations bill. Instead, the Defendant's Memorandum in Support of its Motion to Dismiss acknowledges that the appropriations provisions in HB 2506 "in large part respond to the March 7, 2014 decision of the Kansas Supreme Court in *Gannon v. Kansas*." In so responding, the Legislature, the Defendant argues, was "compelled . . . to incorporate a response into previously addressed and pending legislation, and to include limited appropriations measures related to the overall educational subject of the bill." The Defendant then admits, in its Combined Reply, that, "The inclusion of teacher due process provisions undoubtedly captured some votes in favor of the funding, as did increases in the LOB caps that also are part of HB 2506." Even Governor Brownback identified HB 2506 as an appropriations bill, as quoted in a Wichita Eagle article submitted by the Plaintiff.

The Plaintiff, meanwhile, would have this Court strike down specific portions of HB 2506 as unconstitutional because the bill contains "both appropriations and substantive permanent policy." This is not what *Carlin* stands for, however. *Carlin* mandates that non-appropriations-related provisions must be excised, as unconstitutional, from appropriations bills. In order to apply *Carlin*, however, this Court would need to determine that HB 2506, as a matter of law, is an appropriations bill. This the Court cannot do. As the Plaintiff's own Exhibit P—the conference committee report brief concerning the Senate substitute for HB 2506—makes clear, the appropriations-related provisions found in HB 2506 are intended to provide a funding structure in compliance with the *Gannon* decision. This was not only germane to the subject of

education, it was ordered by the Kansas Supreme Court in a case *entirely* focused on education. Accordingly, it cannot be said that these funding provisions "cannot reasonably be considered as having any legitimate connection with or relationship to each other." *Kansas One-Call Sys., Inc. v. State*, 294 Kan. at 227.

The Court thus concludes that the Plaintiff's Petition fails to state a claim under Article 2, § 16 of the Kansas Constitution as a matter of law. The *Carlin* case does not stand for the proposition that an appropriations provision—or even a series of interrelated appropriation provisions, as was the situation here—cannot ever coincide with non-appropriations provisions, even when logically and reasonably related to one another. Moreover, because the appropriations provisions in HB 2506 are clearly reasonably related to the non-appropriations provisions in subject matter—education, specifically in response to *Gannon*—the Plaintiff's claim under the single subject rule of Article 2, § 16 of the Kansas Constitution must fail as a matter of law. Accordingly, the Court grants the Defendant's Motion to Dismiss the case under K.S.A. 60-212(b)(6).

II. MOTION FOR SUMMARY JUDGMENT

Because the Court has granted the Defendant's Motion to Dismiss the case, the Plaintiff's Motion for Summary Judgment must naturally be denied. However, even if the Court had not granted the Defendant's Motion, it appears that the Plaintiff also failed to present sufficient evidence, under the summary judgment standard, to establish its standing, which was in dispute. See *Gannon v. State*, 298 Kan. at 1123 ("The burden to establish these elements of standing rests with the party asserting it. . . And the nature of that burden depends on the stage of the proceedings because the elements of standing are not merely pleading requirements. Each element must be proved in the same way as any other matter and with the degree of evidence

required at the successive stages of the litigation."). While the Plaintiff's assertion that its membership was comprised of individual teacher-members was sufficient to establish a prima facie showing of standing—which was all that was needed to survive a motion to dismiss—material proof of the identities of these teachers would be required at the summary judgment stage of litigation. Thus, the Plaintiff's Motion for Summary Judgment is denied.

CONCLUSION

For the reasons stated above, the Court GRANTS the Defendant's Motion to Dismiss. The Court also DENIES the Plaintiff's Motion for Summary Judgment. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this 4th day of June, 2015.

Hon. Larry D. Hendricks
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 4TH day of June, 2015, to the following:

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Appendix 3

Minutes of the House Judiciary Committee
February 8, 1972

MINUTES

HOUSE JUDICIARY COMMITTEE

The House Judiciary Committee met at 9:00 a.m., Tuesday, February 8, 1972, in Room 528. The meeting was called to order by the Chairman, Jack R. Euler. All members of the committee were present except Representatives Allison, Dugan, Everett, Gaines, Gray, Hayes, Hill, Hougland, Howard and Nothern.

Mr. Ratner made an interim sub-committee report regarding House Bill 1467. It was the sub-committee's report that H.B. 1467 be reported adversely. Mr. Ratner made such a motion, seconded by Mr. Mills. The vote was in favor of the motion.

House Bill 1576 was next discussed. Mr. Ratner reported that the interim sub-committee suggested that H.B. 1576 be amended on Page 1, Line 8, by striking the words "other than" and inserting in lieu thereof the word "including", further on Line 8, by striking the "comma (,) a" and inserting in lieu thereof the words "or any"; and further on Line 12 by striking the word and number "fifteen (15)" and inserting in lieu thereof the word and number "ten (10)"; by striking all of Lines 13 to 17 inclusive; Mr. Ratner made the motion to adopt the above amendments. Mr. McMaster seconded the motion. The vote was in favor of the adoption of the amendments. Further action on the bill was deferred by the chairman.

H.C.R. 1018, the Judicial Article was considered. Judge Albert Fletcher, President of the District Judges Association was present and stated that the Association felt that the proposed judicial article would make the court system more workable.

Mr. Keenan asked what would happen to the Probate Court under theproposed change in the judicial article. Judge Fletcher replied that would be up to the Legislature. He further stated that if the Judicial Articles were adopted, the Legislature would need to pass implementing legislation on several subjects.

Mr. McMaster asked whether the Judges Association would prefer to have the question submitted at the Primary or the General election. Judge Jim Riddel, Sedgwick County, Chairman of the State Committee, stated they had no definitive position on that question, but the Association did feel that at the time the proposition was approved, the Judges terms would become 6 year terms; thus a judge running for re-election in the General Election would be running for a 6 year term.

There was also the question as to whether this would set up an intermediate court of appeals. Judge Jim Noone, Sedgwick County, stated he felt the approval of the resolution would permit the Legislature to approach this question.

Judge Leo Moroney, Wyandotte County and Judge Harold Riggs, Johnson County, were also present at the hearing.

Jim James, Judicial Administrator, explained the bill in detail and pointed out the changes which would be made in the judicial system if this proposal were accepted by the people. He stated the mechanics contained in this bill would create a uniform court system. He further pointed out that he felt the word "heard" which appears on Page 2, line 2, of the bill needs more explanation, perhpas in the implementing legislation. He pointed out the advantages of a "non-partisan" court; further he explained this proposal would give the court an opportunity to remove justices and judges by a means other than impeachment, as explained on Page 12, Lines 1 through 7.

Mr. Ward Martin, appeard on behalf of the Kansas Bar Association. He stated that the Bar Association Council endorses this proposed amendment to the constitution. He further stated that in 1964, the Committee on Modernization of Kansas Courts, endorsed some of the concepts in this article; and further the Governor's Commission for Constitutional Revision has also endorsed some of the proposed changes.

Mr. Bob Alderson, again explained Senate Bill 6, and the proposed amendments contained in the attached Report, a copy of which is attached hereto and by reference made a part of these minutes.

Mr. Ratner moved that Substitute for Senate Bill 6 be amended on Page 4, Line 20, by striking the words "not authorized to issue capital stock"; Line 20 by striking the "comma" and inserting a "period" in lieu thereof; and striking the balance of Line 21, all of Lines 22, 23, 24, 25 and 26. Mr. McMaster seconded the motion. The vote was in favor of the motion with Messrs Buchele and Grant voting "no".

Mr. Keenan moved that Substitute for Senate Bill 6 be further amended on Page 4, by striking all of lines 14 and 15. Mr. Mills seconded the motion. The motion failed.

Mr. Buchele moved that the substance and content of Substitute for Senate Bill 6, as now amended, be recommended favorable for passage and that the same be placed in a new House Bill to be sponsored and introduced by the Judiciary Committee and referred to the Committee of the Whole. Mr. Ratner seconded the motion. The vote was in favor of the motion with Messrs. Keenan, Grant and Talkington voting "no".