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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
Appellee,

v.

STATE OF KANSAS
Appellant.

BRIEF OF APPELLEE

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

Pedro L. Irigonegaray, #08079
Irigonegaray & Associates
1535 SW 29th Street
Topeka, KS 66611
785-267-6115; 785-267-9458 fax
pli@plilaw.com
Attorney for the Appellee

TABLE OF CONTENTS

Nature of the Case

Section 11 of 2014 House Bill 2338, Chapter 82 of the 2014 Session Laws of Kansas ("HB 2338") provides for the selection of chief district court judges by district court judges. Prior to the passage of Section 11, this Court selected all chief district court judges pursuant to its inherent administrative authority under Article III, Section 1 of the Kansas Constitution and Kansas Supreme Court Rule 107 ("Rule 107"). After the Honorable Chief Judge Larry T. Solomon ("Chief Judge Solomon") brought a petition for declaratory judgment pursuant to K.S.A. 60-1704 challenging the constitutionality of Section 11, the district court of Shawnee County, Kansas, held that this matter is justiciable and that Section 11 is unconstitutional as a violation of the separation-of-powers doctrine. The State of Kansas appealed.

Statement of Issues

Issue I: **Is Section 11 of HB 2338, which strips this Court of its authority to appoint chief district court judges, unconstitutional as a violation of the separation-of-powers doctrine?**

Issue II: **Does Chief Judge Solomon's petition for declaratory judgment challenging the constitutionality of Section 11 of HB 2338 present a justiciable matter?**

Statement of Facts

A. The Genesis of This Court's Constitutional Authority to Administer a Unified Court System

Prior to 1972, the administration of the Kansas judicial system was fragmented and there was no consensus regarding whether this Court possessed the authority to administer the overall system. *See, e.g.*, Spencer A. Gard, *Procedure by Court Rules*, 5 U. Kan. L. Rev. 42 (1957). At the time, the Kansas Constitution did not explicitly grant that authority to this Court. Nevertheless, some legal experts maintained that the

authority was inherent under the separation-of-powers doctrine. *Id.* at 45 (the Kansas State Legislature (the "Legislature") "exceeds its constitutional power when it attempts to impose on the judiciary any rules for the dispatch of judiciary duties"). (R. I, 52-53.)

Any uncertainty was eliminated by the 1972 amendment to Article III, Section 1, of the Kansas Constitution, which vested the judicial power of the State in "one supreme court, district courts, and such other courts as are provided by law." Kan. Const. art. III, § 1. To administer that unified system, Article III, Section 1 was also amended to grant this Court "general administrative authority over all courts in this state." *Id.* (R. I, 53.)

The 1972 amendment to Article III, Section 1 grew out of a report issued in February 1969 by the Citizens' Committee on Constitutional Revision, established by the Legislature. *See* Wesley H. Sowers, et al., *Report of the Citizens' Committee on Constitutional Revision* (Feb. 1969). That report recommended amending Article III, Section 1 to include an explicit grant of authority to this Court to administer the State's entire judicial system in order to "create a unified court with overall administrative authority in the supreme court branch thereof. . . ." *Id.* at 43. Three years later the Kansas citizenry backed that proposal by voting to adopt the current version of Article III, Section 1. (R. I, 53.)

The Judicial Study Advisory Committee, the group tasked with making recommendations to implement the unified court system mandated by the amendment of Article III, Section 1, observed that the people of Kansas have "*wisely vested ultimate administrative authority over Kansas courts in the supreme court*" consistent with "sound principles of judicial administration." Edward F. Arn, et al., *Recommendations for*

Improving the Kansas Judicial System, 13 Washburn L. J. 271, 363-64 (1974) (emphasis added). (R. I, 53-54.)

B. Rule 107: This Court's Delegation of Certain Administrative Authority to the Chief Judges of the District Courts

On July 28, 1976, the Supreme Court, in an exercise of its "general administrative authority over all courts in this state" pursuant to Article III, Section I of the Kansas Constitution, promulgated Rule 107, which provides that the "Supreme Court will appoint a chief judge in each judicial district." In carrying out Rule 107's administrative duties and responsibilities, each chief judge acts as this Court's surrogate in discharging its Article III, Section 1 mandate to administer the State's unified court system. These duties and responsibilities include:

- Supervision of the district court's clerical and administrative functions;
- Supervision of recruitment, removal, compensation, and training of non-judicial personnel;
- Case assignments under this Court's supervision;
- Judge assignments to the district court's special divisions, subject to approval of a majority of the other district judges;
- Development and coordination of statistical information and management;
- Designation of a fiscal officer for each county in each judicial district and the supervision of each fiscal officer's expenditures for the operation of all district court offices in that county;
- Preparation and submission of district court county operating budgets;
- Appointment of standing and special committees necessary to perform the district court's duties;
- Representation of the district court in business, administrative and public relations matters; and

- Evaluation of the district court's effectiveness in administering justice and recommendation of changes.

Rule 107 reflects this Court's judgment that the Court itself should decide which judges are best equipped to serve as its administrative delegates. The relationship between this Court and the districts' chief judges involves a significant level of communication, trust and candor that exceeds the relationship that other members of the bench have with this Court. (R. I, 54-55; R. II, 140-43.)

C. The Enactment of HB 2338 and HB 2005

On April 30, 2014, Kansas Governor Sam Brownback signed HB 2338 into law, with an effective date of July 1, 2014. Section 11 of HB 2338 provides, in relevant part, that "[i]n every judicial district, the district court judges in such judicial district shall elect a district judge as chief judge who shall have general control over the assignment of cases within the district, subject to supervision by the supreme court. The procedure for such election shall be determined by the district court judges and adopted by district court rule." 2014 Session Laws of Kansas, Vol. 1, Chapter 82 at 544. In addition, Section 43 of HB 2338 is a non-severability provision that provides that if any provision of HB 2338 is held to be unconstitutional, the entire statute is invalidated. (R. I, 49, 56; R. II, 119.)

On June 4, 2015, in the midst of the briefing in Judge Solomon's lawsuit challenging Section 11 of HB 2338 in the district court, Governor Brownback signed 2015 House Bill 2005, Chapter 81 of the 2015 Session Laws of Kansas ("HB 2005") into law, with an effective date of June 5, 2015. HB 2005 appropriates the funding for the Kansas judicial branch for fiscal years 2016 and 2017, ending June 30, 2016 and June 30, 2017, respectively. Section 29 of HB 2005 contains a non-severability provision, which provides, in relevant part:

> If any provision of . . . 2014 Senate Substitute for House Bill No. 2338 . . . 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.

2015 Session Laws of Kansas, Vol. 1, Chapter 81 at 1085. (R. I, 79-80, 106; R. II, 149-50).

Shortly thereafter, in its June 15, 2015 combined reply and response brief in this lawsuit, the State quoted Section 29 and informed the district court that if the "Court were to declare Section 11 of 2014 Senate Substitute for House Bill 2338 unconstitutional as Chief Judge Solomon requests, such a ruling would also invalidate 2015 House Bill 2005," resulting in the loss of the Kansas judiciary's entire budget for fiscal years 2016 and 2017. (R. I, 80.)

D. Chief Judge Solomon's Long Working Relationship with This Court

Chief Judge Solomon was first appointed by this Court as chief judge of the 30th Judicial District on July 1, 1991, and has been reappointed bi-annually by this Court ever since—a tenure that approaches a quarter of a century. He is the longest serving active chief judge in the Kansas district court system. As evident by his repeated reappointments during this period, Chief Judge Solomon has earned the trust and confidence of this Court in discharging his administrative duties and responsibilities under Rule 107. (R. I, 4, 55.)

E. Section 11 Alters Chief Judge Solomon's Long-standing Legal Relationship with This Court and with Other Judges in His District

By wresting from this Court the right to choose who it believes is best equipped to serve as its administrative surrogate in each Judicial District, Section 11 has injured Chief Judge Solomon by disrupting his long-standing working relationship with this Court and

altering his relationship with the other judges in his district. To be sure, his colleagues in the 30th Judicial District might vote for Chief Judge Solomon to continue as chief judge after January 1, 2016. However, once Governor Brownback signed HB 2338 into law on July 1, 2014, Chief Judge Solomon's close professional relationship with this Court was substantially altered, as the trust and confidence he built with this Court over decades no longer has a direct bearing on his reappointment as chief judge. Instead, his fellow judges of the 30th Judicial District will now make that determination. In other words, Section 11 has changed his relationship with those judges as well. (R. I, 56.)

F. The Procedural History of This Lawsuit

On February 18, 2015, Chief Judge Solomon filed a petition for declaratory judgment in the district court of Shawnee County, *Solomon v. Kansas*, seeking to declare Section 11 of HB 2338 unconstitutional as a violation of Article III, Section 1 of the Kansas Constitution and the separation-of-powers doctrine. The petition also sought to declare all of HB 2338 invalid by virtue of Section 43, its non-severability provision. (R. I, 3.)

The State moved to dismiss Chief Judge Solomon's petition on March 26, 2015 (R. I, 8) and Chief Judge Solomon cross-moved for summary judgment on May 14, 2015. (R. I, 42.) Oral argument was held on August 28, 2015 before the Honorable Larry D. Hendricks, District Judge. (R. III, 1.) Following oral argument, Judge Hendricks issued his Memorandum Decision and Order, *Solomon v. Kansas*, Case No. 2015-CV-156, on September 2, 2015 (hereinafter "Memorandum Decision"). (R. II, 118.) Judge Hendricks denied the State's motion to dismiss and granted Chief Judge Solomon's motion for summary judgment. Memorandum Decision at 37. (R. II, 154.) Judge Hendricks held that this matter was justiciable and that Section 11 of HB 2338 was

unconstitutional as a violation of the separation-of-powers doctrine. *Id.* (R. II, 154.) In his opinion, Judge Hendricks emphasized that "the position of chief district 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." *Id.* at 26. (R. II, 143.). As such, "the selection of a chief district court judge is inherent in the supreme court's 'general administrative authority,'" and "[t]o hold such a judge accountable to other parties—even if they are his or her peers on the district court—would improperly hamstring" this Court's constitutional authority. *Id.* at 30. (R. II, 147.)

On September 3, 2015, the State filed an Emergency Motion for Stay of Order Pending Appeal requesting that the district court enter an order staying its order granting summary judgment pending the State's appeal of that order. (R. II, 156.) The State filed this motion to prevent the triggering of Section HB 2005, which goes into effect should any portion of HB 2338 be held invalid or unconstitutional. (R. II, 157-58.) If Section 29's non-severability provision were to be triggered, the entire Kansas judiciary would be defunded for fiscal years 2016 and 2017. (*Id.*)[1] That same day, on September 3, 2015, Judge Hendricks granted the State's Emergency Motion for Stay of Order Pending Appeal pending resolution of the State's appeal of that order. (R. II, 160.) On September

[1] Chief Judge Solomon, along with three other Kansas district court judges, is currently challenging Section 29 of HB 2005 as unconstitutional in a pending lawsuit, *Fairchild, et al. v. State of Kansas*, Case No. 2015-CV-000905, in the district court of Shawnee County, Kansas. Meanwhile, in a separate action not involving any of the four judges in *Fairchild*, the State filed a petition for injunctive relief in *State of Kansas ex. rel Schmidt v. Shipman*, Case No. 2015-CV-73 in the district court of Neosho County, Kansas seeking to enjoin Section 29 of HB 2005. In its petition, the State conceded that Section 29 of HB 2005 is unconstitutional as a violation of Article III, Section 13 of the Kansas Constitution. On September 22, 2015, the district court of Neosho County granted the State's motion for a temporary injunction and stay and entered an order enjoining Section 29 until March 15, 2016.

18, 2015, the State appealed Judge Hendrick's decision in *Solomon v. Kansas* to this Court. (R. II, 162.) On October 29, 2015, this Court issued an order setting forth an expedited briefing schedule and oral argument regarding the State's appeal.

Argument and Authorities

Issue I: Is Section 11 of HB 2338, which strips this Court of its authority to appoint chief district court judges, unconstitutional as a violation of the separation-of-powers doctrine?

Standard of Review

When reviewing a trial court's ruling that a statute is unconstitutional, this Court applies a de novo standard of review. *Barrett ex rel. Barrett v. Unified School Dist. No. 259*, 272 Kan. 250, 255, 32 P.3d 1156, 1161 (2001). Plaintiff raised this issue below and the district court ruled on it in Plaintiff's favor. (R. I, 57; R. II, 152.)

Analysis

A. The District Court Correctly Found That Section 11 Constitutes Significant Interference with This Court's Exercise of Its Constitutional Authority to Administer the Kansas Judiciary

Although the Kansas Constitution, like the federal constitution, contains no express provision adopting the doctrine of separation of powers, it has long been recognized that the doctrine is inherent in "the very structure of the three-branch system of government." *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 59, 687 P.2d 622, 634 (1984). "[T]he doctrine of separation of powers is an inherent and integral element of the republican form of government." *Van Sickle v. Shanahan*, 212 Kan. 426, 447, 511 P.2d 223, 241 (1973). *See also* Memorandum Decision at 16 ("The separation of powers doctrine, however, although 'not expressly stated in either the United States or Kansas Constitutions, . . . is recognized as an inherent and integral

element of the republican form of government.'") (quoting *Hays v. Ruther*, 298 Kan. 402, 409, 313 P.3d 782, 788 (2013)). (R. II, 133.) As this Court explained in *Stephan*:

> The doctrine of separation of powers is an outstanding feature of the American constitutional system. The governments, both state and federal, are divided into three branches, *i.e.*, legislative, executive and judicial, each of which is given the powers and functions appropriate to it. Thus, a dangerous concentration of power is avoided through the checks and balances each branch of government has against the other.

236 Kan. at 59, 687 P.2d at 634.

There is no talismanic formula for determining whether one branch's encroachment on another's domain violates the separation-of-powers doctrine. The Kansas courts have taken a "practical" rather than a "theoretical" approach to the question. *Leek v. Theis*, 217 Kan. 784, 805, 539 P.2d 304, 322 (1975). "We must search for usurpation by one department of the powers of another department on the specific facts and circumstances presented." *Id.* A "usurpation of powers exists when there is a significant interference by one branch of government with the operations of another branch." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 884, 179 P.3d 366, 375 (2008).

On the specific facts and circumstances of this case, it is clear why Section 11 amounts to a significant interference with this Court's Article III, Section 1 authority to administer the Kansas judiciary, as concluded by the district court. This Court has made the judgment that choosing which district court judges are best qualified to act as its surrogates in carrying out Rule 107's administrative duties and responsibilities is a decision that should lie with the Supreme Court itself. There could hardly be a more significant encroachment on this Court's administrative prerogatives than an enactment

that seeks to wrest that choice from this Court. As the district court stated below, "[w]ithout the power to choose another chief district court judge to replace a dissatisfactory one—even if that dissatisfaction does not rise to the level where discipline might be appropriate—the supreme court's authority to administer a 'unified court' is severely hamstrung." Memorandum Decision at 31 (R., II, 148) (citing *Behrmann v. Pub. Emp. Relations Bd.*, 225 Kan. 435, 441, 591 P.2d 173, 178 (1979) (stating that Article III, Section 1 provides for "a unified court with overall administrative authority in the supreme court branch thereof")).

Indeed, this Court has made clear that "action by the legislature which attempts to control or dictate the internal, administrative functions of other branches" constitutes "*a clear encroachment upon and violation of the separation of powers doctrine.*" *State v. Greenlee*, 228 Kan. 712, 719, 620 P.2d 1132, 1138 (1980) (emphasis added). *See also State ex rel. Stephan v. Adam*, 243 Kan. 619, 620-21, 760 P.2d 683, 684-85 (1988) (determining that selection for a seat on the Supreme Court Nominating Commission fell under this Court's "general administrative authority"); Memorandum Decision at 15. (R. II, 132.)

B. *State v. Mitchell* Is Binding Precedent Holding That a Supreme Court Administrative Rule "Must Prevail" Over a Conflicting Legislative Enactment

Section 11 is not only unconstitutional under general separation-of-powers principles, but it also runs afoul of the square holding in *State v. Mitchell*, 234 Kan. 185, 195, 672 P.2d 1, 9 (1983), that when the Legislature directly contravenes any administrative rule promulgated by this Court pursuant to its Article III, Section 1 mandate, this Court's rule "must prevail" under the separation-of-powers doctrine. An examination of this Court's legal analysis in *Mitchell* makes it clear that this statement is

a necessary corollary of its separation-of-powers ruling and, as such, constitutes binding precedent that necessitates the invalidation of Section 11.

In *Mitchell*, the trial court ruled that the statute at issue governing jury selection was a violation of the separation-of-powers doctrine and, therefore, refused to follow it. As this Court framed the question: "At issue is whether the Supreme Court has exclusive constitutional power to make rules pertaining to court administration and procedure." *Id.* at 193, 672 P.2d at 8. According to this Court, the answer to that question "requires an examination of the doctrine of separation of powers" and "the source and extent of judicial power in Kansas." *Id.* at 193-94, 672 P.2d at 8.

This Court began its analysis by quoting Article III, Section 1 of the Kansas Constitution, as amended in 1972: "The judicial power of this state shall be vested exclusively in one court of justice. . . . The supreme court shall have general administrative authority over all the courts in this state." From these "unambiguous words," this Court concluded that "the judicial power of Kansas is vested *exclusively* in the unified court system." *Id.* at 194, 672 P.2d at 8 (emphasis in original).

That alone, however, was insufficient to resolve the separation-of-powers question because, as this Court explained, there are two aspects of judicial power, both constitutionally based: (1) the courts' traditional decision-making function, *i.e.*, to hear and resolve a case through a binding judgment, and (2) this Court's "general administrative authority over the court system" expressly granted by Article III, Section 1. *Id.* Pursuant to that general grant of administrative power, this Court held that it possessed "the constitutional authority . . . to promulgate and enforce reasonable rules

regulating judicial administration and court procedure as necessary for the administration of justice," and that such rules "have the force of law." *Id.* at 194, 672 P.2d at 8-9.

But that did not end this Court's analysis either because, in contrast to non-delegable judicial decision-making, this Court can choose to share its administrative authority over the State's unified court system with the legislative branch "without violating the separation of powers doctrine," either by "cooperat[ing] . . . through use of agreed-upon legislation" or by "acquiesce[ing] in legislative action in this area of judicial function." *Id.* at 195, 672 P.2d at 9. In either event, this Court made plain that "[t]he constitutional power over court administration and procedure *remains vested in the judicial branch even though legislation is used to help perform its function.*" *Id.* (emphasis added). Then came the capstone of this Court's legal analysis: "Problems arise only when court rules and a statute conflict. Under such circumstances, *the court's constitutional mandate must prevail.*" *Id.* (emphasis added).

This capstone statement was an integral part of this Court's rationale, following its ruling that the manner in which this Court exercises its grant of general administrative authority is through the promulgation and enforcement of "reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice." *Id.* at 194, 672 P.2d at 8. Put differently, this is simply two sides of the same coin: Where this Court chooses not to exercise its administrative authority over the judiciary but instead shares it with the Legislature, legislative action regarding court administration is consistent with separation of powers. But where this Court chooses to exercise that authority through the promulgation of administrative rules, those rules "must prevail" over any conflicting legislation under the separation-of-powers doctrine.

This was this Court's *ratio decidendi* in *Mitchell*, *i.e.*, "[t]he principle or rule of law on which a court's decision is founded." *Black's Law Dictionary* 1452 (10th ed. 2014).

This Court then applied this legal framework to the facts at bar and held that the statute at issue did not violate the separation-of-powers doctrine because there was no conflicting Supreme Court rule governing jury selection. "The absence of the adoption of such a rule amounts to acquiescence on the part of the judicial branch in legislation." *Mitchell*, 234 Kan. at 195, 672 P.2d at 9.

The district court concurred that *Mitchell*'s capstone statement—that where court rules and a statute conflict, "the court's constitutional mandate must prevail"—was "essential to [the Supreme Court's] decision to set forth the analytical framework above." Memorandum Decision at 20. (R. II, 137.) Accordingly, the district court found that *Mitchell* is "binding precedential authority." *Id.* Although the district court then applied the four-factor test described *infra* Section C before concluding that Section 11 is unconstitutional, this Court need go no further than *Mitchell*'s own reasoning, which mandates the invalidation of Section 11 as a violation of the separation-of-powers doctrine.

Even if *Mitchell*'s capstone statement is *dictum*, however, it is judicial *dictum* that is compelling enough to be treated as "persuasive authority" that should be followed. *See, e.g.*, *First Bank of Wakeeney v. Peoples State Bank*, 12 Kan. App. 2d 788, 791, 758 P.2d 236, 239 (1988). The statement is part and parcel of this Court's comprehensive analysis of the question presented. Indeed, it is even more persuasive authority because, as we have seen, it is consistent with the general principle that it violates the separation-

of-power doctrine for the Legislature to significantly interfere with the judiciary's internal operations.

C. The District Court Was Correct in Finding That Section 11 Is Unconstitutional When Evaluated under the Four Factors Described by This Court in *Sebelius*

As the district court held, Section 11 is also unconstitutional when evaluated pursuant to the four factors described by this Court in *Sebelius*. The four factors that this Court uses to evaluate "whether there has been a significant interference by one branch of government" are: "(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 attained . . . ; and (d) the practical result of the blending of powers as shown by actual experience over a period of time." *Sebelius*, 285 Kan. at 884, 179 P.3d at 375.

As the district court correctly found, when these factors are applied, it is clear that Section 11 significantly interferes with the operations of this Court and is therefore unconstitutional as a violation of the separation-of-powers doctrine. First, the nature of power that is being exercised is fundamentally one of court administration, as the delegation of administrative power to chief district court judges is inherent in this Court's general administrative authority under Article III, Section 1 of the Kansas Constitution. Second, the Legislature has exercised significant control over the judiciary by impermissibly stripping this Court of its ability to choose its surrogates, the chief judges. Third, the Legislature has unjustifiably sought to strip this Court's inherent authority to select chief judges through HB 2338, and it compounded its improper conduct by passing HB 2005's non-severability provision, which threatens the very functioning of the Kansas court system. Finally, the practical result of Section 11 has been that this Court's constitutional authority to administer the Kansas court system has been significantly

harmed and that Chief Judge Solomon's legal relations with this Court and his peer district court judges in the 30th Judicial District have been significantly altered.

1. The Essential Nature of the Power Being Exercised

As the district court found, the nature of the power that is being exercised is fundamentally one of court administration, as the delegation of administrative authority to chief judges is inherent in this Court's general administrative authority under Article III, Section 1 of the Kansas Constitution. As Article III, Section 1 specifies, "[t]he judicial power of this state shall be vested exclusively in one court of justice . . . . The supreme court shall have general administrative authority over all the courts in this state." Kan. Const. art. III, § 1. Section 11 unconstitutionally strips this Court of this inherent general administrative authority by eliminating its power to select chief judges.

The district court observed that the position of chief judge was initially created by statute in 1968, K.S.A. 20-329, before the 1972 amendment to Article III, Section 1 of the Kansas Constitution granted this Court "general administrative authority over all courts in this state." *See* Kan. Laws 1968, ch. 385, § 34. At the time, K.S.A. 20-329 referred to chief judges as "administrative judges." It provided that, "[i]n every judicial district having more than one division, the supreme court may designate an administrative judge who shall have general control over the assignment of cases within said district subject to supervision by the supreme court." K.S.A. 1968 Supp. 20-329. In 1976, following the 1972 amendment to the Kansas Constitution, the Supreme Court promulgated Rule 107, which likewise provided that the Supreme Court would appoint a chief judge in each district. Over the years, subsequent amendments to K.S.A. 20-329 continued to provide for the selection of chief judges by this Court. Moreover, the

position of chief judge changed little through the amendments to the statute. *See* Kan. Laws 1976, ch. 146, § 28;[2] Kan. Laws 1980, ch. 94, § 5;[3] Kan. Laws 1986, ch. 115, § 36;[4] and Kan. Laws 1999, ch. 57, § 17.[5] *See* Memorandum Decision at 22-23. (R. II, 139-40.)

This Court has clearly defined the powers and duties that a chief judge has as this Court's surrogate in discharging many of the administrative duties for his or her district. Rule 107 states that "[t]he chief judge's duties and administrative powers include," among others:

- Supervision of the district court's clerical and administrative functions;
- Supervision of recruitment, removal, compensation, and training of non-judicial personnel;
- Case assignments under this Court's supervision;
- Judge assignments to the district court's special divisions, subject to approval of a majority of the other district judges;

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2 "In every judicial district the supreme court shall designate a district judge as administrative judge who shall have general control over the assignment of cases within said district, subject to supervision by the supreme court. Within guidelines established by statute, rule of the supreme court or district court, the administrative judge of each district court shall be responsible for and have general supervisory authority over the clerical and administrative functions of such court."

3 "In every judicial district the supreme court shall designate a district judge or associate district judge as administrative judge who shall have general control over the assignment of cases within the district, subject to supervision by the supreme court. Within guidelines established by statute, rule of supreme court or the district court, the administrative judge of each district court shall be responsible for and have general supervisory authority over the clerical and administrative functions of such court."

4 Removing the phrase "associate district judge" from the statute, but otherwise leaving the statute unchanged.

5 Renaming the position of "administrative judge" to "chief judge."

- Development and coordination of statistical information and management;
- Designation of a fiscal officer for each county in each judicial district and the supervision of each fiscal officer's expenditures for the operation of all district court offices in that county;
- Preparation and submission of district court county operating budgets;
- Appointment of standing and special committees necessary to perform the district court's duties;
- Representation of the district court in business, administrative and public relations matters; and
- Evaluation of the district court's effectiveness in administering justice and recommendation of changes.

Kan. Sup. Ct. R. 107(b). *See* Memorandum Decision at 23-26. (R. II, 140-43.)

As the district court stated, "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." *Id.* at 26. (R. II, 143.) Moreover, "although the position was created by statute, K.S.A. 20-329 was passed *before* the constitutional amendment to Article III, Sec. 1—in other words, before the grant of 'general administrative authority' to the supreme court was made explicit." *Id.* (emphasis in original). As such, the district court concluded that:

> [T]he selection of a chief district judge is inherent in the supreme court's 'general administrative authority,' as chief district court judges are expected to wield a portion of the administrative authority of the Kansas Supreme Court. The Court further concludes that the selection of a chief district court judge, therefore, is more closely connected to the supreme court's general administrative authority than to the Legislature's power to appoint state officers. A judge who bears the responsibility of wielding the supreme court's administrative powers must, ultimately, be accountable *to* the supreme court. To hold such a judge accountable to other parties—even if they are his or her peers on the district court—would improperly hamstring the supreme court's 'general administrative authority.'"

Id. at 30. (R. II, 147.)

Thus, as the district court determined, this factor of the separation-of-powers inquiry favors Chief Judge Solomon.

2. The Degree of Control by the Legislature Over This Court

The Legislature has unconstitutionally exercised significant control over the judiciary through Section 11 by nullifying this Court's ability to select its surrogates—chief district court judges—in discharging its Article III, Section 1 mandate to administer the State's unified court system. In its decision, the district court stated that in order for it to determine the degree of control excised by the Legislature over the judiciary, it had to consider the nature of the position of chief judge. As the district court found, "the position of chief district court judge is fundamentally entwined with the Kansas Supreme Court's constitutionally-granted general administrative authority." Memorandum Decision at 30-31. (R. II, 147-48.) In fact, "a chief district court judge is an instrument through which the supreme court wields its general administrative authority" under Article III, Section 1 of the Kansas Constitution. *Id.* at 31. (R. II, 147.)

Given that the Supreme Court selects chief judges as its surrogates in discharging its Article III, Section 1 duty to administer the State's unified court system, it is clear that the Legislature has unconstitutionally exercised significant control over the judiciary through Section 11. As the district court stated, "[i]n stripping the Kansas Supreme Court of the power to choose a chief district court judge, the Legislature—while not directly wielding the power to choose itself—is, in fact, exerting itself over the Judiciary: it has chosen *who chooses* chief district court judges." *Id.* (emphasis in original). The district court continued, "[w]ithout the power to choose another chief district court judge to replace a dissatisfactory one—even if that dissatisfaction does not rise to the level where

discipline might be appropriate—the supreme court's authority to administer a 'unified court' is severely hamstrung." *Id.* (citing *Behrmann v. Pub. Emp. Relations Bd.*, 225 Kan. 435, 441, 591 P.2d 173, 178 (1979) (stating that Article III, Section 1 provides for "a unified court with overall administrative authority in the supreme court branch thereof"). Thus, "[t]he Legislature *has* taken that power away from the Kansas Supreme Court and, thus, exerted itself over a fundamental component of the Judiciary." *Id.* at 32 (emphasis in original). (R. II, 149.)

3. The Objective Sought to Be Attained

The Legislature, through Section 11, has sought to strip this Court's ability to select its surrogates in the district courts, the chief judges. As both the district court and the State have stated, this factor should be afforded little weight. (R., I, 89; R., II, 149.) Nevertheless, the Legislature's specific objective of disempowering this Court is further demonstrated by its subsequent passage of HB 2005 and its non-severability provision, which would defund the entire judiciary should HB 2338 be declared unconstitutional. *See* 2015 Session Laws of Kansas, Vol. 1, Chapter 81 at 1085.

As the district court observed:

> When viewed together with § 29 of 2015 House Bill 2005, legitimate questions could be raised about the legislative purpose behind § 11. To strip the power to choose chief district court judges away from the Kansas Supreme Court is one thing; whether or not it constitutes a significant interference with the Judiciary, it may have been explained away, in isolation, with facially permissible legislative objectives. The Plaintiff would suggest that the Legislature has doubled down on this intrusion, however, by threatening to wield the power of the purse as a club against an equal branch of government if its initial intrusion—*i.e.* § 11—is deemed unconstitutional. This, at least, calls into question any presumption the Court might otherwise give to the legislative motive at work in § 11.

Memorandum Decision at 33. (R. II, 150.)

4. The Practical Result of the Blending of Powers As Shown By Actual Experience Over a Period of Time

Finally, the practical result of Section 11 is that this Court is no longer allowed to choose its chief district court judge surrogates in discharging its Article III, Section 1 mandate to administer the State's unified court system. Thus, this Court is no longer able to ensure that the chief judges, who administer the district courts on this Court's behalf, are properly performing their administrative duties.

Moreover, Chief Judge Solomon's legal relations with this Court have been significantly altered. Section 11 has disrupted a decades-long professional relationship between this Court and Chief Judge Solomon, whom the Court has repeatedly reappointed to serve as its surrogate to discharge numerous administrative responsibilities for the 30th Judicial District. Section 11 has also disrupted Chief Judge Solomon's legal relations with his peer district court judges of the 30th Judicial District because it is now their assessment of Chief Judge Solomon that will determine whether he will retain his role as chief judge.

Thus, the practical result of Section 11 demonstrates that HB 2338 unconstitutionally strips away this Court's inherent authority to administer the court system and is unconstitutional in violation of the separation-of-powers doctrine.

Issue II: Does Chief Judge Solomon's petition for declaratory judgment challenging the constitutionality of Section 11 of HB 2338 present a justiciable matter?

Standard of Review

"The existence of jurisdiction and standing are both questions of law over which an appellate court's scope of review is unlimited." *Friends of Bethany Place, Inc. v. City of Topeka*, 297 Kan. 1112, 1121, 307 P.3d 1255, 1262 (2013). Thus, a de novo standard of review is applied. *Id.* Defendant raised this issue below and the district court ruled on it in Plaintiff's favor. (R. I, 68; R. II 129-31.)

Analysis

A. The District Court Was Correct in Finding That Judge Solomon Has Standing to Seek Redress for the Ongoing Injury That Began on July 1, 2014, When Section 11 Became Effective

1. As the District Court Emphasized, Chief Judge Solomon Satisfies the "Relaxed" Standing Requirements for a Declaratory Judgment Action

Chief Judge Solomon brought his petition for declaratory judgment under K.S.A. 60-1704. Kansas courts have long recognized that standing requirements are "relaxed" and "less rigorous" when a plaintiff seeks only a declaratory judgment. *See, e.g.*, *Sebelius*, 285 Kan. at 897, 179 P.3d at 382-83 ("As in federal court, less rigorous requirements have been imposed in declaratory judgment cases; yet, actual cases and controversies are still required."); *Hartman v. City of Mission*, 43 Kan. App. 2d 867, 869, 233 P.3d 755, 758 (2010) (standing rules are "relaxed when only a declaration of legal rights is sought").

These pronouncements are consistent with K.S.A. 60-1713. As the district court emphasized, the Kansas Declaratory Judgment Act "is remedial in nature and its purpose is to settle and provide relief from uncertainty and insecurity with respect to disputed

rights, status and other legal relations *and should be liberally construed and administered to achieve that purpose*." Memorandum Decision at 11 (emphasis in original) (quoting K.S.A. 60-1713). (R. II, 128.) Given that Section 11 is in direct conflict with Rule 107 and its constitutionality is subject to this litigation, the district court found that "[i]n the present situation, there is undoubtedly 'uncertainty' and 'insecurity' with respect to the process governing selection and retention of chief judges across the state." *Id.* Consequently, "under the current state of affairs, chief judges across the state cannot truly be certain whether their performance *as* chief judges will be gauged by the Kansas Supreme Court or by their colleagues." *Id.* The district court therefore concluded that "[i]nsofar as the Plaintiff is entitled to a determination as to who will review his performance as Chief Judge and, if said review is favorable, who will retain him in that position, the Plaintiff has shown standing to challenge the constitutionality of § 11." *Id.* at 12. (R. II, 129.)

In concluding that Chief Judge Solomon has standing to challenge Section 11, the district court did not consider Chief Judge Solomon's affidavit and properly rejected the State's claim that additional discovery of that affidavit was needed in this case. *Id.* at 13. (R. II, 130.) As the court concluded, "[n]o additional discovery is deemed necessary in order to evaluate Plaintiff's standing." *Id.* Additionally, the court did not rely on Chief Judge Solomon's affidavit in reaching the conclusion that Section 11 is unconstitutional as a violation of the separation-of-powers doctrine.

Moreover, K.S.A. 60-1704 grants standing to seek a declaration that a statute is unconstitutional to "any person . . . whose rights, status or other legal relations are affected by [the] statute." Chief Judge Solomon satisfies that requirement in that Section

11 alters his "legal relations" with this Court by requiring that his reappointment as Chief Judge of the 30th Judicial District be decided not by this Court, as it has been for decades under Rule 107, but by his district court colleagues. Correspondingly, Section 11 also alters his "legal relations" with his peer judges of the 30th Judicial District because it is now their assessment of Chief Judge Solomon that will determine whether he will retain his Rule 107 responsibilities as chief judge.

These changes in Chief Judge Solomon's "legal relations" both with the Supreme Court and the judges of 30th Judicial District are more than sufficient to establish his standing to seek a declaration of that provision's invalidity under K.S.A. 60-1704. *See Marchezak v. McKinley*, 607 F.2d 37, 42 (3d Cir. 1979) (Gibbons, J., concurring) (milk producers had standing to challenge rule that altered legal relations with customers and milk handlers as exceeding agency authority). Moreover, this alteration in legal relations occurred no later than July 1, 2014, Section 11's effective date. On that day, "plaintiff's status, and other legal relations" became "directly affected by the legislation." (R. I, 4.)

Accordingly, as the district court found, Chief Judge Solomon satisfies the Kansas Declaratory Judgment Act's "relaxed" standing requirements.

2. Chief Judge Solomon Also Satisfies the Traditional Test for Standing

"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." *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196, 1210 (2014) (internal quotation marks omitted). For an injury to be cognizable, it must be actual or imminent, concrete and particularized. *See id.* Even if the relief sought

in this case went beyond a declaratory judgment, Chief Judge Solomon would satisfy the traditional standing test as well.

As discussed above, Section 11 affects Chief Judge Solomon's "legal relations" with this Court and his colleagues in the 30th Judicial District, which alone is sufficient to also meet the traditional test for standing. *Marchezak*, 607 F.2d at 42 (Gibbons, J., concurring). Additionally, Section 11 disrupts Chief Judge Solomon's particular relationship with this Court as the longest-tenured active chief judge in the Kansas district court system. This long-standing working relationship with this Court not only distinguishes Chief Judge Solomon from other district court judges, but it also makes his injury even more personal and particularized than the injury each of the other incumbent chief judges has sustained as a result of Section 11.

B. The District Court Was Correct in Finding That the Constitutionality of Section 11 Is Ripe for Adjudication

This matter is also ripe for resolution. "The doctrine of ripeness is designed to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract." *Sebelius*, 285 Kan. at 892, 179 P.3d at 379-80 (internal quotation marks and citations omitted).

In determining whether a declaratory judgment action such as this one is ripe for adjudication, the issue is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). That is plainly the case here as evidenced by the parties' arguments for and against the constitutionality of

Section 11. Nor is any further factual development necessary before this matter is ripe for adjudication. "A challenge to a statute or regulation that has not yet been applied *is generally considered fit for judicial determination if the issue raised is a purely legal one, or one which further factual development will not render more concrete.*" *Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 915 (9th Cir. 1981) (internal quotation marks and citations omitted) (emphasis added). That, too, is plainly the case here as both sides agree that "the relevant facts in this matter are not in dispute" (R. I, 12) and, therefore, the issue before this Court is "a purely legal one."

Moreover, as the district court found, "the immediate 'harm' stemming from § 11 is the loss of the right to a certain process governing the selection and retention of chief judges." Memorandum Decision at 13. (R. II, 130.) Additionally, "[t]o the extent that the Plaintiff's right to that selection and retention process has been altered by § 11 and, thus, harmed by it, the harm occurred as of the date § 11 became effective as law." *Id.*

Whether Section 11's alteration of Chief Judge Solomon's relationships with this Court and with his colleagues in the district court occurred at the time the provision became law on July 1, 2014, or inevitably will occur at the time his reappointment becomes subject to a vote of his peers on January 1, 2016, the dispute is neither abstract, hypothetical, nor premature. Surely the dispute is not ripe for adjudication only *if and when* Chief Judge Solomon's peers on the 30th Judicial District vote not to retain him as Chief Judge; the injury at issue here is not the potential loss of the chief judgeship, but the fact that the decision as to Chief Judge Solomon's retention is no longer up to this Court, but instead is in the hands of his fellow district court judges. This replacement of

the decision-maker, and the resulting change in Chief Judge Solomon's relationship with both this Court and his fellow district court judges, is the injury.

Thus, Chief Judge Solomon has presented a justiciable case or controversy.

CONCLUSION

For the aforementioned reasons, Chief Judge Solomon respectfully requests that this Court affirm the district court's holding that this matter is justiciable and that Section 11 of HB 2338 is unconstitutional as a violation of the separation-of-powers doctrine by significantly interfering with this Court's constitutional authority to administer Kansas's unified court system, thereby invalidating HB 2338 in its entirety on the strength of the statute's non-severability provision.

Respectfully submitted,

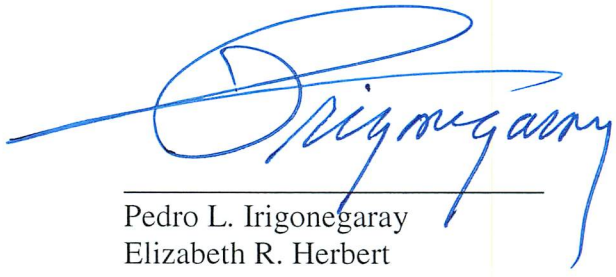
IRIGONEGARAY & ASSOCIATES

Pedro L. Irigonegaray, #08079
Elizabeth R. Herbert, #09420
1535 SW 29th Street
Topeka, KS 66611
785-267-6115; 785-267-9458 fax
pli@plilaw.com; erh@plilaw.com
Attorneys for Appellee

CERTIFICATE OF SERVICE

I certify that on the 25th day of November 2015, a copy of the above was electronically transmitted via the Court's electronic filing system, electronically mailed, and mailed postage prepaid to:

Jeffrey A. Chanay, #12056
Chief Deputy Attorney General
Stephen R. McAllister, #15845
Solicitor General of Kansas
Dwight R. Carswell, #25111
Assistant Solicitor General
Memorial Building, 2nd Floor
120 SW 10th Ave.
Topeka, KS 66612-1597
(785) 296-2215
(785) 291-3767 Fax
jeff.chanay@ag.ks.gov
steve.mcallister@trqlaw.com
dwight.carswell@ag.ks.gov



Pedro L. Irigonegaray
Elizabeth R. Herbert