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CASE NUMBER: 2015-CV-000905

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT

HONORABLE ROBERT FAIRCHILD, CHIEF JUDGE, 7TH JUDICIAL DISTRICT, *et al.,* *Plaintiffs,* vs. THE STATE OF KANSAS, *Defendant.*	Case No. 2015-CV-000905

DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY THE PROCEEDINGS

Defendant State of Kansas, by and through its undersigned counsel, respectfully moves to dismiss the Plaintiffs' Petition for lack of subject matter jurisdiction pursuant to K.S.A. 60-212(b)(1). In the alternative, Defendant moves to stay all proceedings until March 15, 2016, the earliest date upon which any of the Plaintiffs' claims may turn ripe.

I. – Introduction

Plaintiffs are four Kansas state court judges (three of whom are the chief judge of their respective districts) who commenced this declaratory judgment lawsuit alleging that the Kansas Legislature's appropriations bill for the state judiciary covering fiscal years 2016 and 2017 contravenes their rights under the Kansas Constitution. In particular, they maintain that their state constitutional rights are being violated by the appropriations bill's inclusion of a non-severability clause under which all funding would be eliminated if a separate bill (permitting the judges in each district to select their chief rather than entrusting such responsibility to the state supreme court) were to be struck down.

Plaintiffs aver that the appropriations bill's non-severability provision is unconstitutional in that it:

- Violates Article III, Section 1 of the Kansas Constitution by purportedly interfering with the judicial branch's authority "to hear and decide cases on the merits without fear or favor and, therefore, violates the separation of powers doctrine";

- Violates Article III, Section 13 of the Kansas Constitution by threatening to diminish judges' compensation during their terms of office in a manner not applicable to all salaried officers of the State; and

- Violates Article XI, Section 4 of the Kansas Constitution by creating unauthorized conditions on the legislature's obligation to fund the state judiciary.

Plaintiffs' Petition ("Pet."), ¶ 3.

To the extent that these claims even raise justiciable causes of action, however, none is ripe at this point because the Kansas Attorney General obtained a temporary injunction and stay on September 22, 2015 from the Neosho County District Court, enjoining the enforcement of the bill's non-severability clause until March 15, 2016. This stay effectively extinguishes – at least temporarily – any risk of a judicial shutdown, loss of judicial funding, or other constitutional conflict. In other words, there is currently no ongoing dispute, and there is no justiciable case or controversy. The matter is now back before the state legislature, which will have an opportunity to resolve the appropriations dispute when it reconvenes in January 2016.

Defendant thus submits that the most prudent course of action at this point is to dismiss the Plaintiffs' claims on the grounds asserted in this motion or, in the alternative, to stay these proceedings until March 15, 2016. In all likelihood, this entire matter will have been resolved by that date without the need for judicial intervention. Any favorable ruling for the Plaintiffs prior to the legislature being able to reassess its appropriations conditions, however, would not only require this court to exceed its constitutional authority, but it would also invite an unnecessary

clash between two coordinate branches of the Kansas government. Defendant respectfully urges this court to avoid such an eventuality.

II. – Factual Background

The following facts are taken primarily from the Plaintiffs' Petition. But Defendant also references, and requests that this court take judicial notice of, the Neosho County District Court's "Order Granting Temporary Injunction and Stay," entered on September 22, 2015.[1] See Exhibit 1.

1. In 2014, the Kansas Legislature passed, and the governor signed into law, a bill (Senate Substitute for House Bill 2338; hereinafter, "HB 2338") that, *inter alia*, permitted the judges in each judicial district of the State to select their own chief judge rather than having the state supreme court assume that responsibility. Pet., ¶ 12.

2. On February 18, 2015, Plaintiff Larry T. Solomon (the chief judge of the 30th Judicial District) filed a lawsuit in Shawnee County District Court (*Solomon v. Kansas*, Case No. 2015-CV-156) challenging the constitutionality of HB 2338. Pet., ¶ 14.

3. While Judge Solomon's case challenging the constitutionality of HB 2338 was pending, the Kansas Legislature passed, and the governor signed into law, an appropriations bill (House Bill 2005; hereinafter, "HB 2005") providing for funding for the judicial branch for fiscal years 2016 and 2017. Pet., ¶ 15. Section 29 of HB 2005 includes a non-severability clause that negates the judicial branch's appropriations if HB 2338 is declared invalid or unconstitutional. More specifically, this non-severability provision states as follows:

[1] See K.S.A. 60-409. Defendant is *not* asking this court to take judicial notice of any factual findings made by another court; Defendant merely requests – pursuant to K.S.A. 60-409(c) – that this court take judicial notice of the fact that an injunction was issued in the Neosho County District Court on the matters at issue in the case at bar.

> Except as provided further, the provisions of this act are not severable, nor are they severable from the provisions of [HB 2338]. If any provision of this act or of [HB 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 the 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. (Pet., ¶ 17).

4. On September 2, 2015, the Hon. Larry Hendricks of the Shawnee County District Court granted summary judgment to Judge Solomon in the *Solomon v. Kansas* litigation, ruling that the provision in HB 2338 changing the process for appointing the chief judge in each state judicial district violated the separation of powers doctrine under the Kansas Constitution, and in particular, Article III, Section 1 thereof. Pet., ¶ 21.

5. Immediately after the court's ruling, the State requested (and Judge Solomon did not oppose) a stay of the judgment in order to avoid any risk that the judicial branch actually lose all of its funding, a result that was technically triggered by the court's decision. Judge Hendricks granted the stay, effective through the final resolution of any appeal of his ruling by the State to the Kansas Supreme Court. Pet., ¶ 21. (The State's appeal is pending before the Supreme Court. See Case No. 114,573.)

6. On September 22, 2015, nearly three weeks before the Plaintiffs commenced this lawsuit, Kansas Attorney General Derek Schmidt filed a motion for a temporary injunction and stay in Neosho County District Court, requesting that the court there enjoin the Acting Secretary of Administration (who is responsible under state law for authorizing the distribution of funds appropriated by the legislature) from giving effect to the non-severability clause in HB 2005. See Exhibit 1.

7. The Hon. Daryl Ahlquist of the Neosho County District Court granted Attorney General Schmidt's unopposed request for a temporary injunction on September 22, 2015. See

Exhibit 1. The injunction prohibits the State from enforcing the non-severability clause in HB 2005 until March 15, 2016.

8. On October 9, 2015, despite a stay having been issued in the *Solomon v. Kansas* litigation, and an injunction having been issued against the enforcement of the non-severability clause in HB 2005, Plaintiffs filed the underlying action challenging the constitutionality of HB 2005 under the Kansas Constitution.[2] Plaintiffs request a two-pronged declaratory injunction: they seek not only a declaration that the non-severability clause in HB 2005 is unconstitutional, but also a declaration that the remainder of HB 2005 (the actual appropriations for the judicial branch) "shall continue in full force and effect." Pet., ¶¶ 22-23.[3]

III. – Argument

None of the claims at issue here present a justiciable case or controversy sufficient to trigger the court's subject matter jurisdiction. Plaintiffs have no standing to assert the causes of action raised in Counts I and III. Counts I and III also implicate the political question doctrine. Moreover, even if Plaintiffs do have standing for some or all of their claims, and even if the political question doctrine is held to be inapplicable, none of Plaintiffs' claims – including Count II – are ripe for disposition in light of the recent injunction issued by a Neosho County District Court judge barring enforcement of HB 2005, the appropriations statute that is at the heart of this

[2] Plaintiffs previously filed an identical lawsuit in Shawnee County District Court asserting both state and federal causes of actions. *See Fairchild v. State*, Case No. 2015-CV-802. After the State removed the case to federal court on the basis of federal question jurisdiction, Plaintiffs voluntarily dismissed the suit and refiled their Petition here in Shawnee County District Court, this time omitting the federal cause of action.

[3] Based on the docket sheet, it appears that Plaintiffs never paid the docket fee when commencing this suit. See K.S.A. 60-2001(a) ("Except as otherwise provided by law, no case shall be filed or docketed in the district court . . . without payment of a docket fee in the amount of $173.") Although the Supreme Court has held that the docket fee requirement in K.S.A. 60-2001(a) is not jurisdictional, see Avco Fin. Servs. v. Caldwell, 219 Kan. 59, 62-63, 547 P.2d 756, 759-60 (1976), it is clear that the Plaintiffs are not exempt from this fee. See K.S.A. 60-2005 (only entities exempt from docket fee are the State itself and municipalities). Not only are the district courts not included in the statute's definition of "municipality," but Plaintiffs here are all suing in their individual capacities as private citizens. Defendant, therefore, requests that the court order Plaintiffs to pay the requisite docket fee.

lawsuit. Accordingly, Defendant respectfully requests that the court dismiss the action *in toto* or, in the alternative, stay the case until March 15, 2016, the date upon which the Neosho County District Court injunction is slated to dissolve.

A. – The Court Lacks Subject Matter Jurisdiction Over the Plaintiffs' Claims

Although the Kansas Constitution does not contain "case or controversy" language in its description of the scope of judicial power, Kansas courts have adopted such a limitation pursuant to the separation of powers doctrine inherent in the state's constitutional framework. State ex rel. Morrison v. Sebelius, 285 Kan. 875, 896, 179 P.3d 366, 382 (2008). As part of the Kansas case-or-controversy requirement, courts mandate that:

(a) Parties have standing;

(b) Issues are not moot;

(c) Issues are ripe, i.e., they have "taken fixed and final shape rather than remaining nebulous and contingent;" and

(d) Issues do not present a political question.

Id. These justiciability requirements are broadly rooted in the Kansas Constitution's prohibition against advisory opinions. Id. at 897-98, 179 P.3d at 382-83. The fundamental principles at play are that "controversies provide factual context, arguments are sharpened by adversarial positions, and judgments resolve disputes rather than provide mere legal advice." Id. at 897, 179 P.3d at 382. In the absence of such a genuine and concrete dispute, any judgment by the court would be little more than an advisory opinion on an abstract question, which is "inoperative and nugatory" and which would "remain a dead letter . . . without any operation upon the rights of the parties." Id., 179 P.3d at 382 (quotations omitted).

1. – Plaintiffs Have No Standing on Counts I and III

The doctrine of standing focuses on a party's right to assert a legal cause of action or to seek judicial enforcement of some legal duty or right. Kansas Bldg. Indus. Workers Comp. Fund v. State, Case No. 108,607, 2015 WL 5081350, at *17 (Kan. Aug. 28, 2015). "While standing is a requirement for case-or-controversy, i.e., justiciability, it is also a component of subject matter jurisdiction." Id. (quoting Gannon v. State, 298 Kan. 1107, 1122, 319 P.3d 1196, 1210 (2014)). A court must be vested with subject matter jurisdiction in order for it to properly act in a case. State v. Bickford, 234 Kan. 507, 508-09, 672 P.2d 607, 609 (1983). Whether jurisdiction exists is a question of law. Wichita Eagle & Beacon Publ'g Co., Inc. v. Simmons, 274 Kan. 194, 205, 50 P.3d 66, 77 (2002). "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, 858 (2011).

To establish standing under Kansas law, a party must demonstrate that: (1) it suffered a "cognizable injury;" and (2) there is a causal connection between the injury and the challenged conduct. Gannon, 298 Kan. at 1123, 319 P.3d at 1210. In applying these two requirements, the Kansas Supreme Court frequently refers to the federal judiciary's standing elements. Id. That is, the party invoking the court's jurisdiction "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." Id. The burden to establish these elements of standing rests with the plaintiff. Id., 319 P.3d at 1211.

With respect to the first element of the standing test – the "cognizable injury" or "injury in fact" requirement – the court looks to whether the plaintiff "personally suffer[ed] some actual or threatened injury as a result of the challenged conduct." Sierra Club v. Moser, 298 Kan. 22,

33, 310 P.3d 360, 369 (2013). "The injury must be particularized, meaning it must affect the plaintiff in a personal and individual way." Id. at 35-36, 310 P.3d at 371 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 & n.1 (1992)). Further, and of critical importance here, a plaintiff's purported injury "cannot be a 'generalized grievance' and must be more than 'merely a general interest common to all members of the public.'" Gannon, 298 Kan. at 1123, 319 P.3d at 1210 (citing Lujan, 504 U.S. at 575).

Plaintiffs' claims in Counts I and III amount to little more than generalized grievances seeking to ensure the proper administration of the law. The U.S. Supreme Court – to which the Kansas Supreme Court looks as the touchstone on this standing element – has held consistently that such causes of action are beyond the jurisdiction of the judiciary. See Lance v. Coffman, 549 U.S. 437, 442 (2007) ("The only injury plaintiffs allege is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.") Although Plaintiffs may be impacted *indirectly* by the state constitutional provisions at issue in Counts I and III (assuming the validity of the Petition's allegations, of course, as the court must do at this stage of the proceedings), the purported injuries are entirely abstract, in no way imminent, and not unique to Plaintiffs (or any other state court judge for that matter).

In Count I, for example, the Plaintiffs maintain that by conditioning the judicial branch's funding on a particular outcome in the lawsuit challenging the constitutionality of HB 2338, the legislature has interfered with the judiciary's exclusive power to hear and decide cases under the Kansas Constitution. But the right to access a fair and impartial judicial system belongs to the *litigants*, not to the *judges* hearing those cases.

Moreover, Plaintiffs' allegations hardly represent a "concrete and particularized" claim of an "actual or imminent" injury. They are more akin to the sort of "institutional injury" that the Supreme Court confronted in Raines v. Byrd, 521 U.S. 811 (1997), and squarely rejected as a basis jurisdiction. Just as the Court in Raines held that the constitutional challenge to the Line Item Veto Act by individual members of Congress was far too abstract and widely dispersed to trigger the Court's jurisdiction, id. at 829, so, too, here are the Plaintiffs' claims insufficiently particularized to form a valid predicate for subject matter jurisdiction. Indeed, Plaintiffs largely stand on the same ground as every other Kansan who seeks a resolution to the current political dispute between the Kansas Legislature and the state judiciary. It is well settled, though, that the courts will not "entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws." Lujan, 504 U.S. at 581.

In apparent recognition of this case law, one of the Plaintiffs – Hon. Larry Solomon, who commenced a separate lawsuit attacking the constitutionality of HB 2338 – insists he has his own personal stake in the outcome of this case because his "right to a fair and impartial adjudication" of his *other* lawsuit is compromised. His apparent theory is that some state court judges might feel pressured to rule against him out of fear that a contrary result would lead to a loss of their funding by virtue of HB 2005. This argument, with all due respect, appears overly cynical. It is also extraordinarily attenuated and relies on a level of speculation and conjecture inconsistent with the high degree of causation and traceability mandated by the standing doctrine.

Plus, while Judge Solomon's separate case is admittedly still pending on appeal, the fact that the trial court in his lawsuit attacking the constitutionality of HB 2338 had no difficulty in casting aside any undue temptation to reject the claim underscores the invalidity of this cause of action. Just as "a defendant who is acquitted cannot be said to have been deprived of the right to

a fair trial," Morgan v. Getz, 166 F.3d 1307, 1310 (10th Cir. 1999), a plaintiff who obtains the full relief he seeks cannot be said to have been denied his right to an unbiased tribunal. Other than rank speculation, there is no reasonable basis for suggesting that *Judge Solomon* – and not merely some hypothetical plaintiff – has experienced a deprivation of his constitutional rights.

Defendant respectfully submits that Kansas state court judges have more integrity than to be intimidated into issuing a decision that does not comport with their true view of the law simply because they are concerned – rightly or wrongly – that they may face the political ire of the legislature if they rule based strictly on their convictions. In any event, these are not waters into which the judiciary should be wading in light of its limited jurisdiction over such abstract matters.[4]

Similar principles are at play with Count III. Count III merely seeks to enforce the state constitutional provision requiring the legislature to adopt a two-year budget. Plaintiffs, though, have no distinct interest with respect to this claim. Their interest is the same as any other citizen. Their claim is essentially a generalized grievance requesting that the court order the legislature to "do its job." But the court's jurisdiction is not so expansive. An individual taxpayer's claim that government funds are not being spent in accordance with the law "does not give rise to the kind of redressable 'personal injury' required for Article III standing." Hein v. Freedom from Religion Found., 551 U.S. 587, 599 (2007). Logically, the same is true of citizen challenges to

[4] It is also worth noting that, if Judge Solomon felt that impartiality was a real problem because of external pressure from the non-severability clause in HB 2005, he had the option of seeking the recusal of the judge(s) assigned to his case. If he was worried that *all* state court judges would be unduly influenced by the appropriations bill – a position, incidentally, the State believes would be unreasonable as a matter of law – he could have sought the appointment of a judge *pro tem*. See Kan. Const. art. III, § 6(d). He also could have asked the chief judge of the district to name a retired judge to adjudicate the dispute. See Kan. Stat. Ann. 20-2616(a). Clearly, there were/are options available to him. To suggest the non-severability language in HB 2005 contravened his personal rights under the Kansas Constitution, though, is a step too far. The fact that one judge may feel constrained hardly means that all judges feel constrained. And even if they did, as noted above, state law provides ample options to remedy the situation.

the fact that state funds have *not* been appropriated. "Because the interests of the taxpayer are, in essence, the interests of the public at large, deciding a constitutional claim based solely on taxpayer standing would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, which plainly we do not possess." Id. at 600 (internal quotation omitted).

Meanwhile, Judge Solomon's attempt to resurrect standing for himself in Count III fails for the same reasons articulated above in connection with Count I. If he is held to have standing in this case, then so is every other litigant asserting a claim in which a favorable outcome may raise the hackles of the legislature and thereby impact their annual appropriations. Although the matter arose in the context of a discussion of Article III standing, instructive here are the Third Circuit observations in rejecting the proposed standing of a state legislator and other residents who sued the Commonwealth of Pennsylvania contending that the manner in which the state legislature had adopted a judicial pay increase violated their constitutional rights to due process. The court noted that the case presented a classic "example of one of those abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches which the Supreme Court counsels federal courts to avoid adjudicating." Common Cause of Pa. v. Pennsylvania, 558 F.3d 249, 267 (3d Cir. 2009) (citations omitted).

2. – Counts I and III Must Be Dismissed Under the Political Question Doctrine

Counts I and III are also subject to dismissal for lack of subject matter jurisdiction due to the political question doctrine. A cause of action implicating the political question doctrine is not within the reach of judicial protection, and the court must dismiss the action. Baker v. Carr, 369 U.S. 186, 237 (1962); Kan. Bldg. Indus. Workers Comp. Fund, 2015 WL 5081350, at *8.

"The nonjusticiability of a political question is primarily a function of the separation of powers." Baker, 369 U.S. at 210. The application of this doctrine involves "a delicate exercise in constitutional interpretation" as the court probes whether the issue being litigated has been committed to another branch of government. Id. at 211. The Kansas Supreme Court has relied on the U.S. Supreme Court's six-factor test in Baker for demarcating the doctrine's contours. See Kan. Bldg. Indus. Workers Comp. Fund, 2015 WL 5081350, at *9. Under that test, at least one of the following six elements must be present for the political question doctrine to be in play:

(1) A textually demonstrable constitutional commitment of the issue to a coordinate political department;

(2) A lack of judicially discoverable and manageable standards for resolving the issue;

(3) The impossibility of deciding the issue without an initial policy determination of a kind clearly for non-judicial discretion;

(4) The impossibility of a court undertaking independent resolution of the issue without expressing a lack of the respect due coordinate branches of government;

(5) An unusual need for unquestioning adherence to a political decision already made; or

(6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. (citing Baker, 369 U.S. at 217).

Although the test laid out in Baker incorporates "several formulations" that give rise to a political question, each of the formulations varies "slightly according to the settings in which the questions arise." Baker, 369 U.S. at 217. But while the ultimate determination of justiciability is one of balancing, only one of the factors need be present for the political question doctrine to be triggered. Kan. Bldg. Indus. Workers Comp. Fund, 2015 WL 5081350, at *10. In the case at bar, several of the Baker factors appear to be implicated with regards to Counts I and III.

In Count I, Plaintiffs allege that the non-severability provision in HB 2005 violates the separation of powers doctrine by "significantly interfer[ing] with the judicial branch's exclusive constitutional authority under Article III, § 1 of the Kansas Constitution to hear and decide cases on the merits without fear or favor." In Count III, Plaintiffs allege that this same provision also violates Article XI, § 4 of the Kansas Constitution "by creating unauthorized conditions on the legislature's constitutional obligation to fund the Kansas judiciary." Both of these claims fail to pay appropriate deference to the fact that state appropriations are the exclusive province of the legislature. See Kan. Const. art. II, § 24 ("No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."). Indeed, unless public funds are being held in a special trust, see, e.g., Kan. Bldg. Indus. Workers Comp. Fund, 2015 WL 5081350, at *13-14,[5] or there is an express constitutional or statutory limitation on the expenditure of such funds, the legislature's discretion in determining how those funds shall be appropriated is generally unfettered. See, e.g., Pellegrino v. O'Neill, 480 A.2d 476 (Conn. 1984) (constitutional challenge to adequacy of funding for state judiciary presented a nonjusticiable political question); Borough of Glassboro v. Byrne, 357 A.2d 65 (N.J. Super. Ct. App. Div. 1976) (constitutional challenge to adequacy of funding for various municipalities constituted a nonjusticiable political question).

If there is a clear constitutional command or prohibition that a legislative appropriation contravenes, then the judiciary's right to intervene is unquestioned. Count II is a good example. Although that claim is emphatically not yet ripe, the diminution of judges' compensation in HB 2005 would violate the express directive in Kan. Const. art. III, § 13, thereby rendering the cause of action justiciable when (and if) a case or controversy arises. Similarly, in Gannon, the Kansas

[5] Defendant acknowledges that the legislature does not have complete discretion to appropriate funds which the State holds in a trust fund for contributors or a fund over which the State merely acts as a custodian or conduit. See Kan. Bldg. Indus. Workers Comp. Fund, 2015 WL at * 11. But the judiciary's annual appropriation comes from the State General Fund, not some trust. See K.S.A. 75-3036 (defining the Kansas General Fund).

Supreme Court held that the legislature did not enjoy complete discretion over public school funding because the state constitution imposed a "suitable" standard on education appropriations. Gannon, 298 Kan. at 1148, 319 P.3d at 1224. Under this "suitable" standard, the supreme court concluded, terms such as "fitting, proper, appropriate, or satisfactory" could be used to determine whether the legislature had fulfilled its duty. Id. at 1150-51, 319 P.3d at 1250-51.

But unlike the constitutional authorization at issue in Gannon, the Kansas Constitution's authorization for funding of the judiciary does not include any similar standard. Article IV, § 13 simply provides:

> *The justices of the supreme court and judges of the district courts shall receive for their services such compensation as may be provided by law*, which shall not be diminished during their terms of office, unless by general law applicable to all salaried officers of the state. Such justices or judges shall receive no fees or perquisites nor hold any other office of profit or trust under the authority of the state, or the United States except as may be provided by law, or practice law during their continuance in office.

Aside from the general duty of the legislature to raise revenue to pay for the State's current expenses, no other constitutional provision addresses the funding of the judiciary. See Kan. Const. art. XI, § 4 ("The legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years). So long as the compensation of judges is not diminished – a standard governed by Article IV, § 13 – the state constitution is entirely silent as to any standard governing the adequacy of the judiciary's annual funding. In other words, there are no judicially discoverable or manageable standards to apply in the context of a constitutional challenge under either Article III, §1 or Article XI, § 4. The issue is, in short, left to the discretion of the legislature and, ultimately, the broader political process. As the Kansas Supreme Court observed more than forty years ago while invoking the political question doctrine in a legal challenge to the rejection of a gubernatorial appointment by the state senate:

> We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration; those questions are for the consideration of those to whom the State has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.

Leek v. Theis, 217 Kan. 784, 814, 539 P.2d 304, 328 (1975) (quoting Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907)).

3. – None of Plaintiffs' Claims Are Ripe For Review

Defendant further maintains that all of Plaintiffs' claims must be dismissed because none are ripe for review. Ripeness is a justiciability doctrine "designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Shipe v. Public Wholesale Water Supply Dist. No. 25, 289 Kan. 160, 170, 210 P.3d 105, 112 (2009) (quoting National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 807 (2003)). The "doctrine is "intended to forestall judicial determinations of disputes until the controversy is presented in clean-cut and concrete form." New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495, 1499 (10th Cir. 1995).

Although the standing and ripeness doctrines enjoy similarities in that both are rooted in the "case or controversy" requirement and both look to "whether the challenged harm has been sufficiently realized at the time of trial," Morgan v. McCotter, 365 F.3d 882, 890 (10th Cir. 2004), they are not the same. The court's determination as to whether a dispute is ripe "focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention." Kansas Judicial Review v. Stout, 519 F.3d 1107, 1116 (10th Cir. 2008) (quoting Morgan, 365 F.3d at 890). In other words, the ripeness doctrine

"addresses a *timing* question: *when* in time is it appropriate for a court to take up the asserted claim." Id. (quotation omitted).

Two primary factors must guide the court's evaluation as to whether the case is ripe for disposition: (1) the fitness of the issue for judicial resolution; and (2) the hardship to the parties of withholding judicial consideration. Sierra Club v. Yeutter, 911 F.2d 1405, 1415 (10th Cir. 1990) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967)). In examining this first factor, the court looks to whether the issue is purely legal and whether the challenged action is final. Id. The second factor probes what harm, if any, might befall the parties from the court's delaying consideration of the issue. Id.

In light of the recently issued injunction against the enforcement of HB 2005, there is no reasonable argument that a challenge to the constitutionality of HB 2005 is ripe for review. The funding of the Kansas judicial branch is no longer in jeopardy. The State's executive branch has undertaken steps to ensure that the legislature's two-year appropriation for the judicial branch will be enforced notwithstanding any non-severability clause in HB 2005, and the leaders of the Kansas Legislature have announced publicly that they did not intend to strip the judicial branch of funding and will be revisiting the language of HB 2005 when the legislature reconvenes in January 2016. See Exhibit 1.

Were the court to adjudicate the dispute on the merits at this point in time, the case would be largely undeveloped and would be exactly the type of anticipation of contingent events that the ripeness doctrine was intended to forestall. Morgan, 365 F.3d at 891. In the highly unlikely event that the legislature fails to adopt a "clean" appropriations bill for the state judiciary and continues to tie the judiciary's funding to the outcome of a particular lawsuit, Plaintiffs will have ample opportunity to raise a specific challenge to that statute. If that scenario occurs, the factual

issues in the case will be fleshed out and sharpened. On the other hand, if, as is far more likely, the legislature *does* pass a clean appropriations bill, then any decision by this court will have been rendered completely advisory. See Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1109-10 (10th Cir. 2010) ("What makes a declaratory judgment action a proper judicial resolution of a case or controversy rather than an advisory opinion is the settling of some dispute which affects the behavior of the defendant toward the plaintiff. The crucial question is whether granting a *present* determination of the issues offered will have some effect in the real world.") (citations omitted).

Further, none of the Plaintiffs will suffer any undue hardship from the court's delay of a decision on the merits until the legislature has been afforded the chance to revisit the language of HB 2005. The judicial branch's funding remains fully intact, there is no ongoing threat of any diminution of judicial compensation, and no judge has experienced any concrete harm to this point. Any injury that a member of the state judiciary *might* suffer in the future is, at this time, a matter of pure speculation. Nor would the mere postponement of a decision until the Plaintiffs *do* suffer some particularized, concrete injury (if they *ever* do) constitute an independent harm. Morgan, 365 F.3d at 891. In sum, Plaintiffs' claims are unripe for review and thus should be dismissed for lack of subject matter jurisdiction.

B. – If the Court Does Not Dismiss the Case, It Should Temporarily Stay All Proceedings

In the event that this court does not dismiss the Plaintiffs' claims outright for lack of subject matter jurisdiction, Defendant alternatively requests that the Court stay this proceeding until March 15, 2016. The Neosho County District Court has enjoined the enforcement of HB 2338 until March 15, 2016, so there is no imminent fear of a loss of judicial funding in the State of Kansas. In addition, the Shawnee County District Court has stayed its ruling striking down

HB 2338 until the case is definitively resolved by the Kansas Supreme Court. Meanwhile, the Kansas Legislature will be revisiting the appropriations bill it passed for the judicial branch when it reconvenes in January 2016. Accordingly, to the extent this court feels it appropriate to hold off on ruling on the issues addressed herein, given that these proceedings all may be mooted by the actions of the legislature and/or state supreme court in the months ahead, Defendant would request that this court stay these proceedings until at least March 15, 2016.

Defendant's requested action is fully consistent with the approach taken by the Kansas Supreme Court in other legal disputes over legislative appropriations, most notably, the school financing litigation. For example, in Montoy v. State, 278 Kan. 769, 775-76, 102 P.3d 1160, 1165 (2005), after declaring the legislature's educational budget constitutionally infirm, the court simply stayed the proceedings and retained jurisdiction in order to give the legislature time "to fulfill its constitutional responsibility." The court did the same thing in Gannon. 298 Kan. at 1198-99, 319 P.3d at 1251-52. In short, staying the proceeding – and thus preserving the status quo (in which the judiciary is receiving its full funding) – would harm no party and would help ensure that this court does not unnecessarily entangle itself in a speculative and abstract inter-branch dispute that likely will never even come to pass.

IV. – Conclusion

Litigating against well-respected judges before whom the State and undersigned counsel occasionally appear is a delicate task fraught with some peril. Nevertheless, that is the situation required here. Fortunately, Defendant is fully confident that the Plaintiffs in the case at bar will, in adjudicating any future disputes with the State and its counsel, exhibit the same high degree of professionalism and integrity that their colleagues have no doubt displayed in ruling on Judge Solomon's separate constitutional challenge to HB 2338.

The bottom line here, though, is that Plaintiffs simply have not presented a justiciable case to merit proceeding. Not only do they have no standing to pursue Counts I and III, but both of those counts implicate the political question doctrine. Furthermore, none of Plaintiffs' claims – including Count II – are ripe for disposition. Under these circumstances, the most appropriate course of action is for the court to dismiss Plaintiff's entire lawsuit.

WHEREFORE, Defendant respectfully requests that the Court dismiss Plaintiffs' lawsuit pursuant to K.S.A. 60-212(b)(1). In the alternative, Defendant moves to stay all proceedings until March 15, 2016, the earliest date upon which any of the Plaintiffs' claims may turn ripe.

Respectfully Submitted,

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of November 2015, I electronically filed the foregoing DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STAY THE PROCEEDINGS with the Clerk of the Court using the eFlex System, and mailed a copy via the U.S. postal service to the following individuals:

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And the original was filed with the Court using the eFlex System at:

Angela M. Callahan, Clerk of the Court
Shawnee County District Court
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Facsimile: 785-291-4911

By /s/ Bradley J. Schlozman

EXHIBIT 1

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).

EXHIBIT 1

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
102 S Lincoln
P O Box 889
Chanute, KS 66720

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 Daylwitt Clerk

SEAL OF DISTRICT COURT NEOSHO CO., KANSAS

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