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

HONORABLE ROBERT FAIRCHILD, CHIEF JUDGE, 7TH JUDICIAL DISTRICT; HONORABLE JEFFRY L. JACK, DISTRICT JUDGE, 11TH JUDICIAL DISTRICT; HONORABLE LARRY T. SOLOMON, CHIEF JUDGE, 30TH JUDICIAL DISTRICT; HONORABLE MERYL D. WILSON, CHIEF JUDGE, 21ST JUDICIAL DISTRICT; Plaintiffs, -vs.- THE STATE OF KANSAS, Defendant.	CASE NO. 2015-CV-000905

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiffs in this lawsuit, all of whom are sitting Kansas district court judges and three of whom are Chief Judges of their respective judicial districts, submit this memorandum in support of their opposition to the State's motion to dismiss and in support of their motion for summary judgment declaring Section 29 (hereinafter the "non-severability provision") of 2015 House Bill 2005, Chapter 81 of the 2015 Section Laws of Kansas (hereinafter "HB 2005") unconstitutional and unenforceable while holding that the remainder of the statute—which appropriates the judiciary's funding for fiscal years 2016 and 2017—remains in full force and effect.

I. INTRODUCTION

The facts of this case are not disputed. Under the non-severability provision of HB 2005, the Kansas judiciary's funding for fiscal years 2016 and 2017 will be lost if another law, HB 2338, is held unconstitutional. Such a loss would, in the words of the State, "wreak havoc throughout the State" and cause "irreparable harm." Ex. 11 at A-134 to A-135. Yet the threat of just such an event is upon us. Kansas' Third Judicial District has already held HB 2338 unconstitutional in *Solomon v. Kansas*, No. 2015-CV-156 (Sept. 2, 2015), and a decision on appeal from the Kansas Supreme Court is expected before the end of this year. The only other provision protecting against the defunding of the judiciary, a temporary injunction in a separate case brought by the State, *State of Kansas ex. rel Schmidt v. Shipman*, Case No. 2015-CV-73, will expire on March 16, 2016.

To avoid the total defunding of a co-equal branch of government and prevent this blatant assault on judicial independence, Plaintiffs seek a declaration from this Court that the non-severability provision is unconstitutional for three reasons: it violates the separation-of-powers doctrine by linking the entire judicial budget to the outcome of a pending case (Count I); it diminishes judicial salaries in violation of Article III, Section 13 of the Kansas Constitution ("Kansas' Compensation Clause") (Count II); and it violates Article XI, Section 4, which

mandates that the legislature provide "sufficient revenue to defray" the expenses of the judiciary, including judicial salaries (Count III).

Remarkably, while the State has conceded both here and in *Shipman*, *see* Exs. 11-12 at A-128 to A-166, that the non-severability provision is unconstitutional because it diminishes judicial salaries (Count II), it vigorously objects to Plaintiffs' request that this Court declare the same thing here. Instead, it argues that this dispute is not justiciable—claiming Counts I and III but *not* Count II are barred for lack of standing and by the political question doctrine and that all three counts are not yet ripe. None of the State's justiciability arguments poses a bar to adjudicating this case.

First, Plaintiffs have standing to bring all three of their claims. While the State concedes that Plaintiffs have standing to raise Count II, it fails to recognize that Counts I and III assert the *same* injuries resulting from the *same* statutory provision as Count II, which plainly gives Plaintiffs standing to raise all three claims. Under all three counts, Plaintiffs allege a threatened loss of their judicial salaries by virtue of the operation of the non-severability provision. Plaintiff Chief Judge Solomon further alleges that the non-severability provision interferes with the fair adjudication of *Solomon v. Kansas*, the lawsuit challenging HB 2338, in which he is the sole Plaintiff. K.S.A. 60-1713 mandates that the Kansas Declaratory Judgment Act be "liberally construed and administered to achieve" the Act's remedial purpose, which is "to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status, and other legal relations." Plaintiffs' uncertainty and insecurity engendered by the non-severability provision is precisely the same regardless of the ground on which it is shown to violate the Kansas Constitution, giving them standing to seek a declaratory judgment on all their counts.

The direct and concrete harm to Plaintiffs is also plainly distinguishable from the kind of institutional harm found to have been incurred in *Raines v. Byrd*, 521 U.S. 811 (1997), where the U.S. Supreme Court held that six individual members of Congress did not have standing to challenge the constitutionality of the Line Item Veto Act of 1996. Unlike the claim in *Raines*, Plaintiffs' threatened loss of salary and the interference with Chief Judge Solomon's lawsuit mean that Plaintiffs have been "deprived of something to which they *personally* are entitled." *Id.* at 821.

Likewise, Plaintiffs' claims all raise legal questions squarely within the domain of the judicial branch, and are therefore not barred by the political question doctrine—as the State has already conceded with respect to Count II. In each of Plaintiffs' claims, the non-severability provision violates a clear constitutional command or prohibition—circumstances in which, as the State concedes, "the judiciary's right to intervene is unquestioned." (State Mem. at 13.) Nor do the *Baker v. Carr* factors apply. In particular, there is no "textually demonstrable constitutional commitment of the issue" to another branch of government, and the nature of Plaintiffs' claims—a purely legal challenge to the complete defunding of the judiciary if the court strikes down a law in a pending case—provides clear and judicially manageable standards for resolving their case.

Finally, the State argues that none of Plaintiffs' claims is ripe, based on the wholly speculative possibility that the legislature may amend the unconstitutional law. This turns the ripeness doctrine, which is designed to avoid abstract disputes, on its head. Plaintiffs' claims involve purely legal questions about an existing law that poses ongoing and imminent harms to their rights. The mere possibility that the legislature might, on its own, fix an unconstitutional law—which is true whenever the constitutionality of a law is challenged—does not render

Plaintiffs' claims abstract or otherwise unripe. Under the State's view of ripeness, Plaintiffs' claims would only become ripe after the judiciary has already been defunded and when, presumably, there would be no functioning court system available to hear the dispute.

In sum, Plaintiffs urge this Court to deny the State's motion to dismiss and to grant Plaintiffs' motion for summary judgment pursuant to K.S.A. 60-245(c)(2), making clear that HB 2005's assault on the integrity of the judicial system is unconstitutional.

II. FACTUAL BACKGROUND

A. The Relevant Legislative and Litigation History of HB 2338, Preceding the Passage of HB 2005

The genesis of this lawsuit can be traced to the legislature's enactment of 2014 Senate Substitute for House Bill 2338, Chapter 82 of the 2014 Session Laws of Kansas (hereinafter "HB 2338"), and a resulting lawsuit challenging Section 11 of HB 2338 as a violation of the separation of powers under the Kansas Constitution. Under the terms of HB 2005's non-severability provision—the subject of Plaintiffs' challenge in this case—should any part of HB 2338 be struck down, the legislature's appropriation of the entire judicial budget for 2016 and 2017 will be eliminated.

On April 17, 2014, Kansas Governor Sam Brownback signed HB 2338 into law, with an effective date of July 1, 2014. For more than three decades prior to the enactment of HB 2338, the Kansas Supreme Court, pursuant to its "general administrative authority over all courts in this state" granted by Article III, Section 1 of the Kansas Constitution, had appointed the chief judge of each judicial district as its administrative delegate for that district. *See* Supreme Court Rule 107(a)(1) ("The Supreme Court will appoint a chief judge in each judicial district.").[1]

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[1] The position of administrative judge was created by K.S.A. 20-329 in 1968, which provided that the Supreme Court "may" designate an administrative judge in each judicial

Section 11 of HB 2338 wrested that authority from the Supreme Court and gave it to the district judges of each judicial district. *See* Section 11 of HB 2338 ("In every judicial district, the district court judges in such judicial district shall elect a district judge as chief judge.").[2]

On February 18, 2015, Chief Judge Larry T. Solomon of the 30th Judicial District, who is also a plaintiff in this case, filed a petition for declaratory judgment in the Third Judicial District, *Solomon v. Kansas*, No. 2015-CV-156, seeking a declaration that Section 11 of HB 2338 is unconstitutional as a violation of Article III, Section 1 of the Kansas Constitution and the separation-of-powers doctrine, and declaring all of HB 2338 invalid by virtue of its non-severability provision, Section 43 thereof. *See* Ex. 1 at A-1 to A-6.

B. The Passage of HB 2005 and its Non-Severability Provision Tying the Judicial Budget to HB 2338

On June 4, 2015, after *Solomon* had been filed and while it was being briefed before the district court, the legislature passed and Governor Brownback signed into law HB 2005, which appropriates the funding for the Kansas judicial branch for fiscal year 2016, ending June 30, 2016, and fiscal year 2017, ending June 30, 2017, respectively. However, the legislature added a non-severability provision at the end of the statute, which conditions the judiciary's funding for fiscal years 2016 and 2017 on the courts of Kansas not invalidating any provision of either HB 2338 or HB 2005. In relevant part, Section 29 states:

> 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*

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district having more than one division. The provision became mandatory by amendment in 1976, just prior to the July 28, 1976, adoption of Supreme Court Rule 107.

[2] In addition, Section 43 of HB 2338 provides that "the provisions of this act are not severable" and that "[i]f 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."

> *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.*

(emphasis added).

The State then raised the specter of defunding the judiciary in its reply brief in *Solomon*, stating that "if this 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," which "makes fiscal year 2016 and 2017 appropriations for the judicial branch." Ex. 2 at A-8 to A-9.

C. The District Court Invalidates HB 2338

On September 2, 2015, Judge Hendricks issued a ruling in *Solomon*, holding that Chief Judge Solomon's lawsuit was justiciable and that Section 11 of HB 2338 "constitutes a significant interference with the Kansas Supreme Court's powers over the administration of the judiciary" and "violates the separation of powers doctrine in Kansas." Ex. 3 at A-35, A-52. Applying the statute's non-severability provision, the Court struck down HB 2338 in its entirety. *Id.* at A-35.

In his opinion, Judge Hendricks noted:

> 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.*

Id. at A-64 (emphasis added).[3]

On September 3, 2015, the day after Judge Hendricks' decision, the State filed and Chief Judge Solomon did not oppose an emergency motion requesting that the district court stay its order granting summary judgment pending the State's appeal. The State asserted that the non-severability provision "arguably invalidates the entirety of 2015 HB 2005," which "provides fiscal year 2016 and 2017 appropriations for the judicial branch, and so the invalidity of HB 2005 may lead to the loss of all judicial branch funding." Ex. 4 at A-72. This result, according to the State, "would cause irreparable injury to both parties and the public at large." *Id.*

That same day, the court granted the State's motion, "pending resolution of the defendant's appeal of that order or further order of this court." Ex. 5 at A-76.

D. The State's Appeal of *Solomon v. Kansas* is Pending Before the Kansas Supreme Court on an Expedited Schedule

On September 18, 2015, the State filed its notice of appeal to the Kansas Supreme Court in *Solomon v. Kansas*.[4] Ex. 6 at A-78 to A-80. The Court set an expedited briefing schedule, noting that "December 31, 2015, is the expiration date of the terms of office for the current chief judges of the state's 31 judicial districts, all of whom have been appointed by the Supreme Court." Thus, "expeditiously resolving the issue of authority for selecting chief judges is paramount." Ex. 7 at A-82.

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3 The Court declined to address the matter further "because the effect this decision will have on § 29 of 2015 House Bill 2005 exceeds the scope of this Memorandum Decision and Order . . . ." *Id.* at 35.

4 The State appealed the case directly to the Supreme Court pursuant to K.S.A. 60-2101(b), which states: "An appeal from a final judgment of a district court in any civil action in which a statute of this state or of the United States has been held unconstitutional shall be taken directly to the supreme court."

Briefing before the Supreme Court concluded on December 4, 2015, and oral argument occurred on December 10, 2015. *Id.* at A-83. By the terms of the district court's stay, when the Supreme Court renders its decision, expected by the end of 2015, the stay will be lifted and will no longer serve as a barrier to triggering HB 2005's non-severability provision striking down the 2016 and 2017 judicial appropriations.

E. Plaintiffs' Lawsuit Challenging Section 29 of HB 2005

On September 4, 2015, two days after Judge Hendricks' decision invalidating HB 2338, Plaintiffs filed a lawsuit in the Third Judicial District challenging the constitutionality of HB 2005's non-severability provision. Ex. 8 at A-84 to A-95. That lawsuit included the same counts alleged in this suit, as well as an additional fourth claim alleging a due process violation, not pled in the instant matter. *Id.* On October 2, 2015, the State removed the case to federal court based on the due process claim. Ex. 9 at A-96 to A-124. On October 8, 2015, Plaintiffs voluntarily dismissed their case without prejudice. Ex. 10 at A-125 to A-127. On October 9, 2015, Plaintiffs filed the instant matter without the due process claim.

In their petition, Plaintiffs seek a declaratory judgment that the non-severability provision of HB 2005 is unconstitutional and unenforceable, and that the judicial funding provisions of the statute otherwise remain in full force and effect. As the caption reflects, Plaintiffs are all Kansas district court judges, three of whom are chiefs. Chief Judge Larry T. Solomon is also the sole plaintiff challenging the constitutionality of HB 2338, Section 11 in *Solomon*. Their complaint alleges three independent grounds for declaring HB 2005's non-severability provision unconstitutional and thus unenforceable, each of which is grounded in protecting the judiciary's independence as a co-equal branch of government:

1) The provision violates the separation-of-powers doctrine by significantly interfering with the judiciary's exclusive constitutional authority to hear and decide cases under Article III, Section 1 (Count I);

2) The provision violates Article III, Section 13 of the Kansas Constitution, which prohibits any diminution of judicial salaries unless by general law applicable to all salaried officers of the state (Count II); and

3) The provision violates Article XI, Section 4 of the Kansas Constitution, which mandates that the legislature provide sufficient funding for the judiciary for a period of two years (Count III).

F. The State Files a Lawsuit Conceding that Section 29 of HB 2005 is Unconstitutional

On September 22, 2015, two weeks after Plaintiffs first filed suit challenging Section 29 of HB 2005, the State brought a separate action, *State of Kansas ex. rel Schmidt v. Shipman*, Case No. 2015-CV-73, not involving Plaintiffs, in the district court of Neosho County, Kansas, challenging the constitutionality of HB 2005's non-severability provision and seeking injunctive relief. Ex. 11 at A-128 to A-140.[5] In its Petition for Injunctive Relief, the State conceded that the non-severability provision would, if triggered, defund the judiciary, which would violate Article III, Section 13 of the Kansas Constitution—the same claim raised by Plaintiffs in Count II of this lawsuit.

The State acknowledged that "[a] lifting of the stay [in *Solomon*] would render the 2015 Nonseverability Clause operable unless it is enjoined by the court or modified by the

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[5] The defendant is Sarah L. Shipman, Acting Secretary of Administration of the State of Kansas, "who is responsible under state law for authorizing the distribution of funds appropriated by the legislature." (State Mem. at 4 ¶ 6.)

Legislature." *Id.* at A-133 to A-134. "If the stay in *Solomon* were lifted, 2015 HB 2005 would require Defendant Secretary of Administration and Plaintiff State of Kansas to stop all judicial funding, which would wreak havoc throughout the State, including here in Neosho County." *Id.* at A-134. The State conceded that this defunding of the judiciary would violate the Kansas Constitution, stating: "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*," which "*would irreparably harm the State.*" *Id.* at A-134 to A-135 (emphasis added).

At the same time, the State also filed a Motion for Temporary Injunction and Stay, asking the court to "temporarily enjoin[] all parties from giving effect to the nonseverability provision in 2015 House Bill 2005 until March 15, 2016" in order to give the legislature "time to address the nonseverability provision." Ex. 12 at A-142. The Court granted the motion, enjoined the non-severability provision from going into effect through March 15, 2016, and stayed proceedings until the same date. Ex. 13 at A-176. There has been no further activity in the case.

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On November 17, 2015, the State filed its Motion to Dismiss the instant case. Plaintiffs now oppose that motion and cross move for summary judgment.

III. ARGUMENT

A. Plaintiffs' Claims Are Justiciable

Despite the State's concession that the non-severability provision is unconstitutional, it seeks dismissal of Plaintiffs' suit as non-justiciable. The State moves to dismiss Counts I and III on standing and political question grounds and to dismiss all counts as unripe. Notably, the State does not move to dismiss Count II on these grounds. Indeed, the State admits that Plaintiffs have standing to raise Count II and that its adjudication is not barred by the political question doctrine,

stating that Count II "*would* violate the express directive in Kan. Const. art. III, § 13 [regarding the diminution of judicial salaries], thereby rendering the cause of action *justiciable* when (and if) a case or controversy arises." (State Mem. at 13 (emphasis added).)

Given this admission, the State is only able to argue lack of standing for Counts I and III based on a mischaracterization of Plaintiffs' injuries. Plaintiffs do not, as the State argues, "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." (State Mem. at 9.) Plaintiffs' injuries for all three claims—the threatened loss of their judicial salaries—are personal and traceable to the operation of the challenged non-severability provision. Similarly, the political question doctrine is no more applicable to Counts I and III than it is to Count II (where Defendant concedes it does not apply), since all claims raise legal questions squarely within the domain of the judicial branch. Finally, the State's argument that this dispute is not yet ripe is equally unpersuasive. The State cites no authority for its argument that the mere speculative possibility that the legislature could fix an unconstitutional statute renders an otherwise justiciable claim unripe. Plaintiffs' claims are concrete, the dispute is purely legal, and the harms to them are ongoing and imminent. A declaratory judgment in this case is both timely and necessary.

1. Plaintiffs Have Standing

Plaintiffs easily meet the requirements of standing for their claims under Article III, Section 1 and Article XI, Section 4 of the Kansas Constitution. In arguing that Plaintiffs assert mere "generalized grievances seeking to ensure the proper administration of the law," (State Mem. at 8), the State mischaracterizes Plaintiffs' injuries. The operation of HB 2005's non-severability provision would result in Plaintiffs' loss of their judicial salaries. Its passage also casts a shadow on the adjudication of Chief Judge Solomon's legal challenge to HB 2338 in

Solomon. These harms are concrete and particularized, and directly traceable to the operation of the challenged non-severability provision. Plaintiffs thus have a personal interest in receiving clarification regarding the legality of the non-severability provision through a declaratory judgment. As such, Plaintiffs' suit represents a "case or controversy" for which they have standing.

Kansas' Declaratory Judgment Act grants standing to seek a declaration that a statute is unconstitutional to "[a]ny person . . . whose rights, status or other legal relations are affected by [the] statute," and mandates that the Act be "liberally construed and administered to achieve" its remedial purpose, "to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status, and other legal relations." K.S.A. 60-1703. For this reason, Kansas' courts have long recognized that standing requirements are "relaxed" and "less rigorous" when a plaintiff seeks only a declaratory judgment under K.S.A. 60-1704, although "actual cases and controversies are still required." *See, e.g.*, *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897, 179 P.3d 366, 382-83 (2008) ("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 at 755, 758 (2010) (standing rules are "relaxed when only a declaration of legal rights is sought").

Here, Plaintiffs each have a personal interest in clarification, through a declaratory judgment, as to whether the non-severability provision is valid, creating an actual case and controversy. As sitting Kansas state judges, Plaintiffs all face concrete injuries that are traceable to the non-severability provision, thus establishing standing under Kansas law. *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196, 1210 (2014).

To establish an injury, a plaintiff must have "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).[6] Count I's separation of powers claim and Count III's claim based on the legislature's mandate to fund the courts each turns on the fact that HB 2005's non-severability provision threatens to defund the judiciary, including Plaintiffs' own salaries. This kind of pecuniary injury plainly constitutes an injury in fact and gives them a personal stake in a declaration of the non-severability provision's validity. *See, e.g., Douglas Timber Operators, Inc. v. Salazar*, 774 F. Supp. 2d 245, 252 (D.D.C. 2011) ("Economic harm is a canonical example of injury in fact sufficient to establish standing.") (internal citations omitted); *Hosein v. Gonzales*, 452 F.3d 401, 404 (5th Cir. 2006) ("Standing clearly exists when a plaintiff alleges direct economic harm."); *Gonzalez v. Pepsico, Inc.*, 489 F. Supp. 2d 1233, 1240 (D. Kan. 2007) ("[E]conomic injury is a paradigmatic form of injury in fact.").

Additionally, the law is well settled that if the injury-causing event is "imminent and probable," the event need not have already occurred to establish standing. *Sierra Club*, 298 Kan. at 40-42, 310 P.3d at 374 (holding that if an electric power corporation were permitted to construct a coal-fired power plant, it would create increased health risks in the future, particularly in certain populations of which plaintiffs were members); *see also Cochran v. State, Dep't of Agric., Div. of Water Res.*, 291 Kan. 898, 910, 908 249 P.3d 434, 438, 444 (2011) (finding that plaintiffs, owners of prior water appropriation rights, had standing to challenge city's permit to appropriate water, which could imminently injure the value of their property).

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[6] While Kansas, not federal, law determines whether or not a case is justiciable, Kansas courts may look to federal law for guidance. *See Gannon*, 298 Kan. at 1119, 319 P. 3d at 1208.

Chief Judge Solomon, moreover, has an additional direct and personal stake in a declaratory judgment due to his status as the plaintiff in *Solomon*, where he is challenging the validity of HB 2338. Because the non-severability provision directly ties the judiciary's funding to the outcome of Chief Judge Solomon's lawsuit, putting inappropriate pressure on the judges hearing his suit and creating at least the appearance of a conflict that threatens judicial impartiality, its operation injures Chief Judge Solomon as a litigant. Chief Judge Solomon thus has an additional personal interest in a declaratory judgment clarifying whether the provision is constitutional and thus enforceable in connection with his lawsuit.[7]

Plaintiffs' injury is also "fairly traceable to the defendant's allegedly unlawful conduct." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 590 (1992) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The Kansas Supreme Court has made clear "that the fairly traceable standard does not set a high bar for plaintiffs." *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 359 P.3d 33, 51 (Kan. 2015). Rather, plaintiffs need only show a "causal connection between the injury and the challenged conduct." *Gannon*, 298 Kan. at 1123, 319 P.3d at 1210 (internal quotation marks omitted). Moreover, "'indirectness is not necessarily fatal to standing, . . . because the fairly traceable standard is lower than that of proximate cause.'" *Kansas Bldg. Indus. Workers Comp. Fund*, 359 P.3d at 51 (citing *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013)).

Here, Plaintiffs' injuries have a clear causal connection to the operation of the non-severability provision. The threatened loss of their judicial salaries is directly traceable to the

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[7] The fact that the district court found HB 2338 unconstitutional does not, as the State suggests, undermine Plaintiffs' claim that the non-severability provision puts inappropriate pressure on the courts. (State Mem. at 9.) It is not a court's ruling that demonstrates whether or not undue influence has been exerted. Indeed, as the Pennsylvania Supreme Court made clear in *Stilp v. Commonwealth*, 905 A.2d 918, 978 (Pa. 2006), where a non-severability provision appears to be aimed at securing a coercive effect upon the Judiciary, it necessarily implicates the separation of powers.

non-severability provision. Indeed, courts have found standing in cases with attenuated causal relationships, unlike the strong causal connections at issue here. *See, e.g.*, *Kansas Bldg. Indus. Workers Comp. Fund*, 359 P.3d at 51-52 (finding that entities and individuals that paid Kansas fees for practicing trade or transacting business in the state had standing to challenge legislation that directed the transfer of money from fee fund accounts (which plaintiffs had contributed to) into the State General Fund and which indirectly caused plaintiffs to have to pay increased fees to replenish the funds that had been transferred by the state under the challenged law).

The State mischaracterizes Plaintiffs' injury, arguing that Plaintiffs have a mere generalized grievance objecting to an injury to the judicial system writ large. (State Mem. at 8.) But the threatened loss of salary and the harm to Chief Judge Solomon as a litigant are particular and concrete injuries that distinguish Plaintiffs from "every other Kansan." (State Mem. at 9.) *Raines v. Byrd*, which the State relies on, is inapposite. In *Raines*, the U.S. Supreme Court held that plaintiffs, six individual members of Congress, did not have standing to challenge the constitutionality of the Line Item Veto Act of 1996. 521 U.S. 811, 829-30 (1997). The Court's reasoning rested, in part, on its conclusion that the members of Congress merely lost a portion of their political power, and that they had not been "deprived of something to which they *personally* are entitled." *Id.* at 821. The Court specifically distinguished the *Raines* plaintiffs from the congressman in *Powell v. McCormack*, 395 U.S. 486, 496 (1969), in which the Court found that his "constitutional challenge to his exclusion from the House of Representatives (and his consequent loss of salary) presented an Article III case or controversy." *Raines*, 521 U.S. at 821. Like the plaintiff in *Powell*, Plaintiffs in this case allege the threatened loss of things to which they are personally entitled, including their whole salaries.

Finally, a finding by this Court that the non-severability provision is unconstitutional and that the rest of HB 2005 remains in full force and effect would redress the imminent threatened loss of Plaintiffs' salaries and the harm to Chief Judge Solomon. *See Lujan*, 504 U.S. at 561 (finding that it must be "'likely'" that "the injury will be 'redressed by a favorable decision'") (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

2. The Political Question Doctrine Does Not Apply

The State also invokes the political question doctrine, whereby courts are barred from hearing cases that deal directly with issues that are the sole responsibility of other branches of government. Significantly, as with standing, the State has already admitted that the political question doctrine is inapplicable to Count II. (*See* State Mem. at 13.) The State provides no basis for concluding that where, as here, a court admittedly has jurisdiction to review the constitutionality of a statute on one ground, it should be barred by the political question doctrine from reviewing the constitutionality of the same statute on other grounds.

The State also concedes that, where a statute contravenes "a clear constitutional command or prohibition . . . the judiciary's right to intervene is unquestioned." (State Mem. at 13.) Here, as alleged in Count I, the non-severability provision violates the separation-of-powers doctrine by threatening to defund the judiciary if a court holds HB 2338 unconstitutional. While it is the legislature's job to appropriate funds, it is the courts' responsibility to ensure that those laws are constitutional. Moreover, this is not a case where a court is even arguably invading the legislature's province, such as its power to determine the amount of an appropriation, but is rather one where the legislature has invaded the province of the courts by threatening to defund them if they decide a case contrary to the legislature's wishes. Accordingly, the statue at issue violates a clear constitutional prohibition and, therefore, "the judiciary's right to intervene is unquestioned." Indeed, the Kansas Supreme Court has made it clear that the issue of whether the

legislature has violated the separation-of-powers doctrine is a justiciable question for courts to decide. *See e.g.*, *Sebelius*, 285 Kan. at 884, 179 P.3d at 375.

Similarly, as alleged in Count III, the non-severability provision violates Article XI, Section 4, which mandates: "The legislature *shall* provide, at each regular session, for raising *sufficient revenue* to defray the current expenses of the state for two years." (Emphasis added). This is an unqualified command to the legislature to raise all necessary state funds, including judicial expenses. Since the non-severability provision would cut off *all* funding to the judiciary, and the judiciary's current expenses are obviously more than zero, the non-severability provision clearly violates Article III, Section 13, however one might interpret the word "sufficient." Accordingly, for this reason as well, the statute violates "a clear constitutional command" so that "the judiciary's right to intervene is unquestioned." (State Mem. at 13.)

In addition, the Kansas Supreme Court has held that a case can only "be dismissed as nonjusticiable on the ground of a political question's presence" if one or more of the six factors articulated by the U.S. Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962) is "inextricable from the case at bar." *Gannon*, 298 Kan. at 1137, 319 P.3d at 1218; *see Kan. Bldg. Indus. Workers Comp. Fund*, 359 P.3d at 43. That is not the case with regard to either Count I or Count III.

The State relies in its brief solely on the first two *Baker* factors: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department"; and (2) a "lack of judicially discoverable and manageable standards for resolving [the issue]." *Baker*, 369 U.S. at 217.

With respect to the first *Baker* factor, there is no textually demonstrable constitutional commitment to another branch of government of the power to decide whether a piece of

legislation, in this case the non-severability provision, is constitutional. *Cf. Nixon v. United States*, 506 U.S. 224, 229 (1993) (finding that the Senate had sole power to try all impeachments and that a challenge to impeachment procedures was therefore a political question). To the contrary, determining the constitutionality of a statute in general and the issue of whether a law violates the separation-of-powers doctrine or the legislature's constitutional duty to provide sufficient funds to the judicial system are clearly questions for the judicial branch. *See e.g.*, *Hays v. Ruther*, 298 Kan. 402, 409, 313 P.3d 782, 788 (2013); *Sebelius*, 285 Kan. at 883-84, 179 P.3d at 375; *State v. Mitchell*, 234 Kan. 185, 193 672 P.2d 1, 8 (1983).

Similarly, with respect to the second factor, there are clear judicially discoverable and manageable standards available to this Court for determining whether a violation of the Kansas constitution has transpired. In adjudicating Count I, there is extensive guidance on when the separation-of-powers doctrine has been violated, including whether there has been a significant interference by the legislature. *See* Section III.B.2 *infra*.[8] Regarding Count II, the constitutional

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[8] While the State relies exclusively on the first two *Baker* factors, the remaining factors are likewise absent in this case: (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

With respect to the third factor, there is no need for a policy determination of a kind clearly for nonjudicial discretion; rather, the issue is strictly a legal issue as to the application of the separation-of-powers doctrine. With respect to the fourth factor, this court would not be expressing a lack of respect due to the legislature in deciding Count I. To the contrary, the non-severability provision evidences a lack of respect for the judiciary. With respect to the fifth factor, there is no unusual need here for "unquestioning adherence" to the legislature's decision to defund the judiciary. Finally, with respect to the sixth factor, there is no potential embarrassment from a pronouncement by the courts about the constitutionality of Article XI, Section 4, as the

requirement that the legislature raise "sufficient" revenue in Article XI, Section 4 is clearly a discoverable and manageable standard; however a court might construe the word "sufficient," HB 2005, which would cut off *all* funds to the judiciary if HB 2338 were held unconstitutional, obviously does not meet this standard. *See Gannon*, 298 Kan. at 1149-56, 319 P.3d at 1224-29.[9]

In sum, the constitutionality of the non-severability provision rests with this Court, and none of the *Baker* factors is "inextricable from the case at bar." Indeed, this case follows *a fortiori* from *Gannon*, where the Supreme Court held that the plaintiffs' claims related to the sufficiency of school financing under the Constitution were not subject to the political question doctrine even though, unlike Plaintiffs' case, that matter did involve a legislative determination as to the amount of an appropriation. *Id.* at 1136-61, 319 P.3d at 1218-31. Accordingly, all of Plaintiffs' counts are justiciable, and the State's arguments related to the political question doctrine must be rejected.[10]

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courts unquestionably have the power to determine whether statutes are constitutional. *See Gannon,* 298 Kan. at 1159, 319 P.3d at 1230.

9 With respect to the third *Baker* factor, there is no need for there to be a policy determination of a kind clearly for nonjudicial discretion to determine if the absence of funding is "sufficient." With respect to the fourth factor, courts would not express a lack of respect due to the legislature in deciding Count I. As the Supreme Court held in *Gannon*, "[i]t is well within the province of the judiciary to determine whether a coordinate branch of government has conducted itself in accordance with the authority conferred upon it by the constitution." *Id.* at 1157, 319 P.3d at 1229. With respect to the fifth factor, there is no unusual need for "unquestioning adherence" to the legislature's decision to defund the judiciary. Finally, with respect to the sixth factor, there is no potential embarrassment from a pronouncement by the courts about the constitutionality of Article XI, Section 4, as the courts clearly can determine whether statutes are constitutional.

10 *Pellegrino v. O'Neill*, 480 A.2d 476 (Conn. 1984) and *Borough of Glassboro v. Byrne*, 357 A.2d 65 (N.J. Super. Ct. App. Div. 1976), cited by the State at page 13 of its memorandum, are inapposite. In *Pellegrino*, the Supreme Court of Connecticut found that the issue before it was not whether the funding provided to the judiciary was adequate, but was rather whether the number of judges whom the legislature had

3. Plaintiffs' Claims Are Ripe

Finally, the State moves to dismiss all three of Plaintiffs' claims on ripeness grounds, making this the *only* argument put forward by the State in support of dismissing Plaintiffs' Count II. The State argues that Plaintiffs' claims are not ripe because, as a result of the temporary injunction in *Shipman*, "[t]he funding of the Kansas judicial branch is no longer in jeopardy" and the legislature "will be revisiting the language of HB 2005" when it reconvenes. (State Mem. at 16.) This reasoning is wholly unpersuasive. Neither the temporary injunction nor the State's suggestion that a hypothetical future event *could* occur—the legislature's revisiting of the non-severability provision—has any bearing on the ripeness of this dispute. Delay will harm Plaintiffs—the threat of defunding has cast a shadow on the *Solomon* litigation for half a year and, if the Supreme Court upholds the district court's finding that Section 11 of HB 2338 is unconstitutional, HB 2005's non-severability provision will go into effect on March 16, 2016.

In assessing whether a declaratory judgment action, such as this one, is ripe for review, the question 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). The State calls for an unprecedented expansion of this doctrine, arguing that the mere possibility that the legislature could amend the law and remove an unconstitutional provision renders Plaintiffs' claims unripe. This is not the law, nor should it be.

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appointed to the superior court was adequate. *Pellegrino*, 480 A.2d at 481. In *Byrne*, municipalities challenged the adequacy of the amount of funding that the legislature had already appropriated to them. *Byrne*, 357 A.2d at 67. The court found that such desired increases were barred by the political question doctrine because the appropriations already given "represent[ed] an *exercise of legislative judgment*." *Id.* (emphasis added).

The purpose of the ripeness doctrine is "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 addition to consideration of whether the dispute is sufficiently concrete, a court must also consider "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

The mere fact that the legislature could act to fix the unconstitutional non-severability provision does nothing to render this dispute, which involves purely legal questions about an existing law that is causing ongoing and imminent harm, any less concrete or otherwise unripe. First, there is nothing abstract about this dispute. HB 2005 was passed on June 4, 2015, and appropriates the judiciary's current budget—for fiscal year 2016—as well as the budget for fiscal year 2017. The non-severability provision challenged in this suit would have already gone into effect but for Judge Hendricks' stay order in *Solomon* and the temporary injunction order in *Shipman*. Moreover, the stay will be lifted imminently, once the Kansas Supreme Court issues its decision, and the temporary injunction expires in a matter of months, on March 15, 2016. It is not and cannot be the law that Plaintiffs must wait for the judiciary to be actually defunded for their claims to be ripe for adjudication.

In addition, the threat of judicial defunding has already placed inappropriate pressure on the judiciary's adjudication of the constitutionality of HB 2338 in *Solomon*. By passing HB 2005 into law while a legal challenge to HB 2338 was pending in *Solomon*, the legislature tied the court's adjudication of *Solomon* to the judiciary's funding, including judges' salaries.

Indeed, as discussed in Section II.B *supra*, the State ensured that the court in *Solomon* would understand the threat posed by HB 2005's non-severability provision by opening its reply in support of its motion to dismiss with a warning to the court that if it found HB 2338 unconstitutional, the judiciary would lose its funding. Plaintiffs' dispute is thus clear, concrete, and nothing like the "'ill-defined controversies over constitutional issues, or a case which is of a hypothetical or abstract character'" in which the ripeness doctrine precluded adjudication. *See Sebelius*, 285 Kan. at 892, 179 P.3d at 380 (citing *Flast v. Cohen*, 392 U.S. 83, 100 (1968)).

Nor would this dispute benefit from further time for factual development. *See Thomas*, 473 U.S. at 581 (ripeness is supported when a dispute is "purely legal, and will not be clarified by further factual development"). "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). Here, the non-severability provision has already become law and its effect is clear on the face of the statute, as has been admitted by the State. The State points to no factual disputes or factual development that would contribute to the Court's adjudication of Plaintiffs' claims.

Finally, this matter is ripe because delay will harm Plaintiffs. The *Solomon* case has been proceeding for half a year under the threat of court defunding, and, if the Supreme Court finds Section 11 of HB 2338 unconstitutional, then the non-severability provision itself will go into effect on March 16, 2016. "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 143 (1974) (quoting *Pennsylvania v. West Virginia,*

262 U.S. 553, 593 (1923)). *See also Plant Oil Powered Diesel Fuel Sys., Inc. v. ExxonMobil Corp.*, 801 F. Supp. 2d 1163, 1181 (D.N.M. 2011) (in determining the hardship to the parties if the court delays consideration of the dispute, a court must consider the imminence of the harm). Moreover, while the State boldly asserts that "Plaintiffs will have ample opportunity to raise a specific challenge" 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" (State Mem. at 16), the time remaining before March 16 is barely sufficient to allow adjudication of this matter before the non-severability provision takes effect. Within that time period, the parties must complete briefing—which, under court rules,[11] will not be completed until January 22, 2016, at the earliest—the Court will likely hold oral argument, and then it must render a decision. Under the State's characterization of the law regarding ripeness, Plaintiffs' only remedy is to wait to see if the legislature takes action and, if it does not, face a defunded judiciary.[12]

The hypothetical future events pointed to by the State in no way diminish the actual conflict before this Court. The State argues that this Court cannot adjudicate the constitutionality of the non-severability provision because "the leaders of the Kansas Legislature" have indicated their plans to revisit HB 2005 when the legislature goes back into session in January 2016, and

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[11] Allowing 21 days for the State's opposition to Plaintiffs' motion for summary judgment and reply in support of its motion to dismiss and 14 days for Plaintiffs' reply in support of its motion for summary judgment. *See* KAN. D.C.R. 3.202 Motions in Civil Cases. This timeline does not account for extra service days, if applicable, or any extensions of time.

[12] The pressure the non-severability provision places on Chief Judge Solomon's ongoing suit in *Solomon* is an additional hardship unique to him. *See* Wright, Miller & Cooper, 13B Fed. Prac. & Proc. Juris. § 3532.2, at 143 ("[T]he prospect or fear of future events may have a real impact on present affairs.").

that the legislature may pass a new court-funding bill. (State Mem. at 16-17.) But a legislature can always take action to remedy an unconstitutional law—the fact that members of the legislature have expressed the desire to repeal an unconstitutional provision does not render a controversy about an existing law unripe. Such logic is absurd and contrary to well-established law—indeed, the State points to no authority supporting its assertion that a legislator's stated intent to modify an unconstitutional law in the future renders a legal challenge to that law unripe. Nor does the State at all grapple with fact that the legislature may not remedy the situation it has created.[13]

The prospective relief requested in this case—a declaration that the non-severability provision is unconstitutional—is precisely the purpose imagined by the Declaratory Judgment Act: "to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status and other legal relations." K.S.A. 60-1713. Ripeness does not require Plaintiffs to face continued uncertainty simply because the legislature *could* modify the law in the future.

B. Plaintiffs Are Entitled to Summary Judgment

Plaintiffs allege that the non-severability provision violates three provisions of the Kansas Constitution. The State concedes that the provision violates Kansas' Compensation Clause, Article III, Section 13 (Count II), by unconstitutionally reducing judicial salaries. This concession alone entitles Plaintiffs to summary judgment under K.S.A. 60-256(c)(2). *See Zimmerman v. Bd. of Cnty. Commr's of Wabaunsee Cnty.*, 293 Kan. 332, 344, 264 P.3d 989, 999 (2011) ("Summary judgment is appropriate when there is no genuine issue as to any material fact

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[13] For example, in 2015, delays in passing a budget brought Kansas dangerously close to a furlough of all state agency nonessential personnel. *See* Jonathan Shorman, *State Workers to Be Furloughed June 7 unless Budget Passed*, Topeka Capital-Journal (May 31, 2015), http://cjonline.com/news/2015-05-31/state-workers-be-furloughed-june-7-unless-budget-passed.

and the moving party is entitled to judgment as a matter of law") (citing *Warner v. Stover*, 283 Kan. 453, 455, 153 P.3d 1245, 1247 (2007)); *S. Cent. Kansas Health Ins. Group v. Harden & Co. Ins. Services, Inc.*, 278 Kan. 347, 350, 97 P.3d 1031, 1033 (2004) (same). Moreover, the State's concession that the non-severability provision violates Kansas' Compensation Clause is supported by clear law.

While the non-severability provision's violation of Kansas' Compensation Clause is alone sufficient for this Court to declare the provision unconstitutional, the provision also violates Article III, Section 1 (Count I) and Article XI, Section 4 (Count III). The non-severability provision violates separation of powers under the Kansas Constitution by linking the entire judicial budget to the outcome of a pending case (Count I). Such an aggressive thumb on the scale of justice in pending litigation is simply without precedent, either in Kansas or anywhere else in the country. It profoundly interferes with the judiciary's exclusive authority to hear and decide cases, and is wholly inconsistent with the separation-of-powers doctrine. Likewise, by fully defunding the judiciary in the event any provisions of HB 2338 are struck down, the non-severability provision violates the Kansas Constitution's requirement that the legislature raise all necessary funds—including those for the judiciary (Count III).

1. As the State Has Conceded, the Non-Severability Provision Violates Article III, Section 13 of the Kansas Constitution (Kansas' Compensation Clause) (Count II)

HB 2005's non-severability provision will, if triggered after the Supreme Court rules in *Solomon* and the temporary injunction expires in *Shipman*, void the state's judicial appropriations law, thus defunding the judiciary and, by definition, reducing judicial salaries. Such a reduction in salary violates the plain text of Article III, Section 13 of the Kansas Constitution (Kansas' Compensation Clause), which bars the reduction of judges' salaries except by a law applicable to all salaried state officials. The non-severability provision also violates the

Compensation Clause by conditioning judicial salaries on the outcome of a pending lawsuit—undermining judicial independence in exactly the way the Compensation Clause was designed to prevent.

Under the plain text of the statute, there is no ambiguity that the non-severability provision of HB 2005 defunds the judiciary, including the provision of judicial salaries, if any part of HB 2338 is struck down. Sections 2 and 3 of HB 2005 appropriate the judiciary's operating budgets for fiscal years 2016 and 2017, which include the payment of judicial salaries. Section 29 of HB 2005 states that "[i]f any provision of this act or of [HB 2338], is stayed or is held to be invalid or unconstitutional . . . the provisions of this act are hereby declared to be null and void and shall have no force and effect." No other law provides an alternative source of appropriations to the judiciary. Thus, if Section 29 goes into effect, the judiciary, including Plaintiffs' salaries, will be defunded.

Because the non-severability provision defunds judicial salaries, it facially violates Article III, Section 13 (Kansas' Compensation Clause), which 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." (emphasis added).

Given the clear text of the non-severability provision, it is not surprising that the State has repeatedly conceded that if the provision is triggered, "the result would be immediate elimination of all judicial branch funding," Ex. 11 at A-134, in violation of the Compensation Clause.[14] In

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[14] *See also id.* ("A lifting of the stay [in *Solomon*] would render the 2015 Nonseverability Clause operable unless it is enjoined by the court or the Legislature."); Ex. 4 at A-72 ("[Since] 2015 HB 2005 provides fiscal year 2016 and 2017 appropriations for the judicial branch . . . the invalidity of HB 2005 may lead to the loss of all judicial branch

Shipman, the State's Count I asserts "a potential violation of Article 3, § 13 of the Kansas Constitution, that is functionally the same as the similar claim asserted by the *Fairchild* plaintiffs." *Id.* at A-132. In alleging its claim, the State admitted: "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." *Id.* at A-134. The State concluded that such an outcome would "wreak havoc throughout the state" and cause "irreparabl[e] harm" such that "[n]o action at law would provide an adequate remedy." *Id.* at A-134 to A-135. Given the State's admission that the non-severability provision is unconstitutional in *Shipman*, the State cannot suggest otherwise here.

The non-severability provision also violates Kansas' Compensation Clause by conditioning the payment of judicial salaries on the outcome of a pending lawsuit, *Solomon v. Kansas.* This flies in the face of the Clause's role in maintaining the separation of powers and protecting the independence of the judiciary.

While we are not aware of Kansas case law interpreting the Compensation Clause, the U.S. Supreme Court has unequivocally held that the federal Compensation Clause, which is functionally equivalent to the Kansas analogue, prohibits diminishing the compensation of sitting judges in order to protect the "longstanding Anglo-American tradition of an independent

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funding . . . caus[ing] irreparable injury to both parties and the public at large."). Likewise, in its order granting a temporary injunction against the operation of Section 29 of HB 2005 in *Shipman*, the District Court found that "[i]f 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." Ex. 13 at A-171. As a result, the Court granted the State's request for a temporary injunction until March 15, 2016.

Judiciary." *United States v. Will*, 449 U.S. 200, 217-18 (1980).[15] The Court has explained that the purpose of the Compensation Clause is to ensure that judges' "judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support." *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933). A law linking judicial salaries with the outcome of a pending case is wholly inconsistent with this fundamental principle.

Several state supreme courts have echoed the U.S. Supreme Court's reasoning in considering their compensation clauses, including Alaska's, whose compensation clause was the model for Kansas' Compensation Clause. *See, e.g.*, *Buckalew v. Holloway*, 604 P.2d 240, 245 (Alaska 1979) ("There is no doubt that judicial independence was a paramount concern of the delegates."); *Hudson v. Johnstone*, 660 P.2d 1180, 1185 (Alaska 1983) ("That the drafters of Alaska's constitution sought to insulate the judiciary from political pressure that might interfere with its impartiality is clear."); *see also* Kan. Att'y. Gen. Op. No. 87-2, 1987 WL 290400, at *2

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15 When interpreting provisions of the Kansas Constitution, the Kansas Supreme Court consistently looks to the U.S. Supreme Court's interpretation of comparable federal constitutional provisions. *See, e.g.*, *State v. Scott*, 265 Kan. 1, 5-6, 961 P.2d 667, 670 (1998) (interpreting Kansas' "cruel or unusual" provision consistent with the Eighth Amendment); *Murphy v. Nelson*, 260 Kan. 589, 597-98, 921 P.2d 1225, 1232 (1996) (interpreting "due course of law" in Section 18 of the Kansas Constitution, and its application to prisoner's rights, based on U.S. Supreme Court interpretations of the Due Process Clause dealing with the same issue); *State v. Schultz*, 252 Kan. 819, 834, 850 P.2d 818, 829 (1993) (interpreting "unreasonable searches and seizures" in Section 15 of the Kansas Constitution, and coverage of electronic records therein, based on the U.S. Supreme Court's interpretation of the Fourth Amendment and its "expectation of privacy" test); *State v. Kimberlin*, 267 Kan. 659, 664, 984 P.2d 141, 144-45 (1999) (interpreting "unreasonable searches and seizures" in Section 15 of the Kansas Constitution, and its application to material in outdoor trash bags, based on U.S. Supreme Court interpretations of the Fourth Amendment dealing with the same issue).

(Jan. 9, 1987) (stating that Alaska was the model for Kansas' Compensation Clause).[16] Likewise, Kansas Attorney General Robert T. Stephan stated in Opinion 87-2 that "the underlying purpose of the proscription against diminishing judicial compensation was to assure an independent judiciary," by protecting the Kansas courts from undue interference by the legislature through control of the judiciary's livelihood. *Id.*; *see also In re Lietz Const. Co.*, 273 Kan. 890, 902 47 P.3d 1275, 1285 (2002) ("While an opinion of the Attorney General is neither conclusive nor binding on this court, an attorney general opinion may be persuasive authority.").

By tying the judiciary's funding to a court decision, the non-severability provision introduces precisely the temptation that courts and the Kansas Attorney General warned could compromise an independent judiciary. Section 29 of HB 2005 is therefore exactly the kind of provision compensation clauses were designed to protect against. For this reason as well, it is unconstitutional.

2. The Non-Severability Provision Also Violates the Separation-of-Powers Doctrine by Significantly Interfering with the Judiciary's Exclusive Power to Hear and Decide Cases under Article III, Section 1 of the Kansas Constitution (Count I)

The State's concession that the non-severability provision violates Kansas' Compensation Clause (Count II) is sufficient for this court to declare it unconstitutional. Additionally, by making the legislature's appropriation of the judiciary's budget for 2016 and 2017 dependent upon an outcome favorable to the State in *Solomon*, the non-severability provision also interferes with the judiciary's exclusive right to hear and decide cases under

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16 *See also DePascale v. State*, 47 A.3d 690, 699 (N.J. 2012) ("The No–Diminution Clause of the Federal Constitution, of the 1844 Constitution, and of today's State Constitution all serve the same purpose—to maintain the separation of powers and promote true judicial independence. . . . It ensures that the judicial branch will not become subservient to the other branches and will be capable of carrying out its mission in our constitutional democracy.").

Article III, Section 1 of the Kansas Constitution, representing a profound violation of the separation-of-powers doctrine.

Article III, Section 1 of the Kansas Constitution specifies that "[t]he judicial power of this state shall be vested exclusively in one court of justice." *See Mitchell*, 234 Kan. at 194, 672 P.2d at 8 ("It is apparent from the unambiguous words of the constitution that the judicial power of Kansas is vested *exclusively* in the unified court system." (emphasis in original)). At its core, "judicial power" is the power to hear and decide cases on the merits without fear of or favor to any party. *See id.*, 234 Kan. at 194, 672 P.2d at 8 (finding that the term "judicial power" has "been defined as the power to hear and determine a cause and the rights of the parties to a controversy, and to render a binding judgment or decree based on present or past facts under existing laws").

While the Kansas Constitution does not contain an express provision that adopts the separation-of-powers doctrine, it has long been recognized that the doctrine is inherent in the very structure of the three-branch system of government, which provides for independent legislative, executive, and judicial branches. *Sebelius*, 285 Kan. at 883, 179 P.3d at 374; *Solomon v. Kansas*, No. 2015-CV-156, Ex. 3 at A-47 (citing *Hays*, 298 Kan. at 409, 313 P.3d at 374). The separation-of-powers doctrine is also inherent in the structure of the Kansas Constitution, which "creates three 'distinct and separate' branches of government." *State v. Buser*, 302 Kan. 1, 2015 WL 4646663, at *1 (July 1, 2015) (quoting *Coleman v. Newby*, 7 Kan. 82, 87, 1871 WL 696 (1871)).

The separation-of-powers doctrine is violated whenever one branch of government significantly interferes with the function of another branch. *Solomon*, No. 2015-CV-156, Ex. 3 at A-47; *see also Leek v. Theis*, 217 Kan. 784, 805, 539 P.2d 304, 322 (1975) ("We must search

for a usurpation by one department of the powers of another department on the specific facts and circumstances presented."). "[A]ction by the legislature which attempts to control or dictate the internal, administrative functions of the other branches . . . would be 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).

The non-severability provision creates just such an intrusion into the judiciary's exclusive power to hear and decide cases under Article III, Section 1 of the Kansas Constitution. As discussed above, HB 2005 became law during the briefing of *Solomon* before the district court. *See* Section II.B *supra*. Under the non-severability provision, should Chief Judge Solomon demonstrate successfully that HB 2338 is unconstitutional, as he did before the district court, the entire judiciary could lose its funding. Indeed, the State made sure to clarify to Judge Hendricks that this would be the outcome were he to rule against it. *See* Ex. 2 at A-8 to A-9. The effect and timing of the passage of HB 2005 constitutes a significant interference with the exclusive power of the judiciary to hear and decide cases.

The Supreme Court's recent decision in *State v. Buser*, 302 Kan. 1, 2015 WL 4646663 (July 1, 2015), provides further support to Plaintiffs' claim that the non-severability provision violates the separation-of-powers doctrine. In *Buser*, the Kansas Supreme Court held that K.S.A. 2014 Supp. 20-3301, which became effective July 1, 2014, and imposed specific deadlines by which Kansas state courts were required to issue decisions on all motions, bench trials, and appeals, violated the separation-of-powers doctrine. *Id.* at 1-2, 2015 WL 4646663 at **1-2. The Court observed that "[t]he power to determine when a court renders its decisions is essential to the basic judicial power 'to hear, consider and determine controversies between rival litigants.'" *Id.* at 8, 2015 WL 4646663 at *6 (quoting *Sebelius*, 285 Kan. at 896, 179 P.3d at 382). The

Court further noted that the power to determine when decisions are rendered is a power that constitutes a "sphere[] of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest a court of its absolute command within this sphere is to make meaningless the very phrase judicial power." *Id.* (quoting *Coate v. Omholt*, 662 P.2d 591, 594 (Mont. 1983) (quoting A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 29-30 (Nov. 1958))).

If such a statute, which merely dealt with the *timing* of judicial decision-making, is a violation of the separation-of-powers doctrine, *a fortiori* HB 2005's non-severability provision, which influences the *content* of judicial decision making, is a violation of the separation-of-powers doctrine as well. A statute that seeks to "dictate to a judge how he shall judge or how he shall comport himself in judging or which seeks to surround the act of judging with hampering conditions clearly offends the constitutional scheme of the separation of powers and will be held invalid." *Id.* at 12, 2015 WL 4646663 at *9 (quoting *Coate*, 662 P.2d at 594). HB 2005 does just that—it threatens dire consequences for the entire Kansas judiciary through the loss of judicial funding for two fiscal years, should any portion of HB 2005 or HB 2338 be held unconstitutional.

3. The Non-Severability Provision Violates Article XI, Section 4 of the Kansas Constitution by Imposing a Condition on Its Constitutional Obligation to Allocate Judicial Funding (Count III)

The non-severability provision also violates Article XI, Section 4 of the Kansas Constitution, by conditioning the judiciary's continued funding through fiscal year 2017 on resolving *Solomon* against Chief Judge Solomon's challenge to Section 11 of HB 2338 and in favor of the State. Article XI, Section 4 reads: "The legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years."

This is an unqualified command to the legislature to raise all necessary state funds, including judicial expenses. Given that judicial funding for fiscal years 2016 and 2017, as provided by HB 2005, is mandated by Article XI, Section 4 of the Kansas Constitution, the conditioning of this funding on the resolution of Chief Judge Solomon's challenge to HB 2338, pending when HB 2005 passed, is unconstitutional.

C. The Remainder of HB 2005 Should Remain in Full Force and Effect

Plaintiffs seek a two-part declaration in their challenge to HB 2005's non-severability provision: In addition to declaring that the non-severability provision is unconstitutional and unenforceable, this Court should also find that the rest of HB 2005 remains in full force and effect.

HB 2005's non-severability provision applies both to the remainder of HB 2005 as well as HB 2338. *See* Section II.B *supra*. Therefore, should this Court find that HB 2005's non-severability provision is unconstitutional, unless it explicitly severs the non-severability provision, thus upholding the remainder of HB 2005, the judiciary will be defunded for fiscal years 2016 and 2017.

The Kansas courts have not yet addressed whether a non-severability provision that violates the separation-of-powers doctrine can be severed or struck down while the remainder of a statute remains in full force and effect. However, this Court should follow the persuasive reasoning of the Supreme Court of Pennsylvania in *Stilp v. Commonwealth*, 905 A.2d 918 (Pa. 2006), where the court which struck down a comparable non-severability provision as a violation of the separation-of-powers doctrine in circumstances similar to this case.

In *Stilp*, the court considered whether a Pennsylvania statute had the effect of reducing judicial salaries in violation of the state constitution. As background, the legislature first passed a statute that increased judicial, executive, and legislative salaries, and *inter alia*, provided for

unvouchered expense allowances for the legislature ("Act 44"). Following political backlash, the legislature passed another statute that completely repealed Act 44, including the increase in judicial salaries, and re-implemented the prior compensation schemes ("Act 72"). The Supreme Court of Pennsylvania first invalidated Act 72 to the extent that it diminished judicial salaries in violation of Article V, Section 16 of the Pennsylvania Constitution. *Id.* at 981.[17]

Then, in order to determine whether the judicial salary provision in Act 44 could be reinstated, the court considered the constitutionality of Act 44—including the unvouchered expense provision and the Act's non-severability provision—which would void the Act should any part of it, including the unvouchered expense provision, be determined to be unconstitutional. The Court concluded that the unvouchered expense provision was unconstitutional. The Court nevertheless left the remainder of Act 44—which was constitutional—in full force and effect, concluding that the non-severability provision itself violated the separation of powers. *Id.*

In determining that the unvouchered expense provision should be severed, the court began by identifying its primary question: "whether and when the [legislature] may dictate the effect of a judicial finding that a provision in an act is 'invalid.'" *Id.* at 977. The court noted the scarcity of authority on this question but that "those authorities to consider the matter have distinguished (and rightfully so, in this Court's view) between appropriate uses of nonseverability clauses and uses which are more problematic in light of separation of powers concerns." *Id.* at 979.

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[17] Article V, Section 16 of the Pennsylvania Constitution is similar to Article III, Section 13 of the Kansas Constitution in that it prohibits the diminution of judicial salaries unless by general law applicable to all salaried officers of the state.

The Court explained that the non-severability provision at issue in *Stilp* fell into the latter category. Because the statute that included the non-severability provision also "includes compensation provisions for the Judiciary," the non-severability provision "acts as an incentive to engage in a less exacting constitutional inquiry." *Id.* at 980. Such an incentive, the Court made clear, is improper. *Id.* The Court, therefore, concluded that, "enforcement of the clause would intrude upon the independence of the Judiciary and impair the judicial function. Accordingly, we will not enforce the clause but instead we will effectuate our independent judgment concerning severability." *Id.*

This Court should follow *Stilp* and hold that HB 2005's non-severability provision is an unconstitutional violation of the separation-of-powers doctrine, while simultaneously upholding the remainder of HB 2005. As in *Stilp*, HB 2005's non-severability provision raises significant separation of powers concerns. By conditioning the judiciary's entire funding for a two-year fiscal period on a finding that all provisions of HB 2005 and HB 2338 are constitutional, the legislature has placed profound pressure on any judge adjudicating disputes related to HB 2005 or HB 2338 to find in favor of the State. The fact that Chief Judge Solomon's constitutional challenge to Section 11 of HB 2338 was pending at the time that the legislature decided to insert the non-severability provision into HB 2005 simply increases the "incentives" condemned by the court in *Stilp*. The non-severability provision, therefore, intrudes upon the independence of the judiciary and puts at risk objective constitutional inquiry. Accordingly, as the non-severability provision is a violation of the separation-of-powers doctrine, this Court should declare it to be null and void, while keeping the remainder of HB 2005 in full force and effect.

The Kansas legislature has a constitutional obligation to pass a judicial appropriations bill under Article XI, Section 4, which provides: "The legislature shall provide, at each regular

session, for raising sufficient revenue to defray the current expenses of the state for two years." Kan. Const. art. XI, § 4. Thus, the legislature would still have passed a judicial appropriations bill despite the inclusion of any unconstitutional provision such as HB 2005's non-severability provision. This Court should therefore declare the non-severability provision null and void, while keeping the remainder of HB 2005 in full force and effect.

D. A Stay of Proceedings Is Not Appropriate in This Case

The State argues that this Court need not consider the constitutionality of the non-severability provision because "the Kansas Legislature will be revisiting the appropriations bill it passed for the judicial branch when it reconvenes in January 2016." (State Mem. at 18.) The fact that the legislature could modify the law prior to the end of the temporary injunction on March 16, 2016—something that is true any time a plaintiff challenges an unconstitutional law—provides no comfort to Plaintiffs. It is imperative that this Court adjudicate the constitutionality of the law as it stands to ensure the judiciary remains funded, regardless of the legislature's actions (or inaction).

Indeed, the State cites to no relevant precedent for the proposition that proceedings in this case should be stayed. In *Montoy v. State*, 278 Kan. 769, 775-76, 102 P.3d 1160, 1165 (2005), which the State relies on, the Kansas Supreme Court declared the legislature's education budget constitutionally infirm before staying further proceedings to allow the legislature time to propose a remedy. This was because the court determined that there were "'literally hundreds of ways' the financing formula can be altered" to comply with the constitution. *Id.* at 775, 1165. In *Gannon*, 298 Kan. at 1198-1200, 319 P. 3d at 1251-52, also relied on by the State, the Kansas Supreme Court did not institute a stay at all. The Court ruled on the constitutionality of the state's education regime and remanded with guidance to the three-judge panel below on

assessing the remedy. *Id.* In *Montoy* and *Gannon*, the Court did not delay adjudicating the constitutionality of the challenged laws. Plaintiffs ask this Court to do the same.

E. Plaintiffs' Uncontroverted Contentions of Fact

The material facts pertinent to Plaintiffs' summary judgment motion, which the State does not dispute, are:

1) On July 1, 2014, 2014 Senate Substitute for House Bill 2338, Chapter 82 of the 2014 Session Laws of Kansas, became law, including Section 11 that, as written, takes the selection of district court chief judges away from the Supreme Court and entrusts it to a vote of the district court judges in each judicial district. (HB 2338, Section 11.)

2) Section 43 of HB 2338 provides that if any provision of the enactment is held to be unconstitutional, it was the legislature's intent that the entire enactment would be invalid. (HB 2338, Section 43.)

3) On February 18, 2015, Chief Judge Larry T. Solomon of the 30th Judicial District filed a petition for a declaratory judgment, *Solomon v. Kansas*, No. 2015-CV-156, in the Third Judicial District. (Ex. 1 at A-1 to A-6.)

4) Chief Judge Solomon sought a declaration in *Solomon* that Section 11 of HB 2338 is unconstitutional as a violation of Article III, Section 1 of the Kansas Constitution and the separation-of-powers doctrine, and declaring all of HB 2338 invalid by virtue of its non-severability provision, Section 43 thereof. (*Id.* at A-2.)

5) On June 4, 2015, during briefing in *Solomon*, the Kansas legislature passed and Governor Brownback signed into law 2015 House Bill 2005, Chapter 81 of the 2015 Section Laws of Kansas. (HB 2005.)

6) HB 2005 appropriates all funding for the Kansas judicial branch for fiscal year 2016, ending June 30, 2016, and fiscal year 2017, ending June 30, 3017, including all judicial salaries. (HB 2005, Sections 2, 3.)

7) HB 2005, Section 29, provides that if any provision of either HB 2005 or HB 2338 is stayed or is held to be invalid or unconstitutional, all provisions of HB 2005 will be null and void. (HB 2005, Section 29.)

8) On September 2, 2015, the Third Judicial District issued a ruling in *Solomon*, holding that Chief Judge Solomon's lawsuit was justiciable and that Section 11 of HB 2338 is unconstitutional and violates the separation-of-powers doctrine in Kansas. The Court struck down HB 2338 in its entirety by virtue of the statute's non-severability provision. (Ex. 3 at A-66.)

9) On September 3, 2015, the State filed, and Chief Judge Solomon did not oppose, an emergency motion requesting that the district court in *Solomon* stay its order granting summary judgment pending appeal. (Ex. 4 at A-70 to A-74.) The district court granted the State's motion that same day. (Ex. 5 at A-75 to A-77.)

10) On September 18, 2015, the State filed its notice of appeal to the Kansas Supreme Court in *Solomon v. Kansas*, No. 114,573. The State appealed directly to the Supreme Court pursuant to K.S.A. 60-2101(b). (Ex. 6 at A-78 to A-80.)

11) The Supreme Court set an expedited briefing schedule in *Solomon v. Kansas*, culminating in oral argument on December 10, 2015. (Ex. 7 at A-81 to A-83.)

12) On September 4, 2015, two days after the district court's order in *Solomon v. Kansas*, Plaintiffs filed a lawsuit in the Third Judicial District challenging the constitutionality of HB 20005's non-severability provision. (Ex. 8 at A-84 to A-95.) On October 2, 2015, the State removed the case to federal court based on the due process claim. (Ex. 9 at A-96 to A-124.) On October 8, 2015, Plaintiffs voluntarily dismissed their case without prejudice. (Ex. 10 at A-125 to A-127.) On October 9, 2015, Plaintiffs filed the instant matter without the due process claim. (*Fairchild* Petition.)

13) On September 22, 2015, the State brought a separate action, *State of Kansas ex. rel Schmidt v. Shipman*, Case No. 2015-CV-73, not involving Plaintiffs, in the district court of Neosho County, Kansas, challenging the constitutionality of HB 2005's non-severability provision and seeking injunctive relief. (Ex. 11 at A-128 to A-140.) The State simultaneously moved for a temporary injunction. (Ex. 12 at A-141 to A-166.) That same day, the district court granted a temporary injunction of the non-severability provision that remains in effect until March 15, 2016. (Ex. 13 at A-167 to A-177.)

14) In *Shipman*, the State said: "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." (Ex. 11 at A-134.) The State explained: "If operation of the 2015 Nonseverability Clause were to result in the elimination of all judicial branch funding for 2016 and 2017, then judicial salaries necessarily would be reduced in violation of Article 3, § 13," which "would constitute irreparable harm." (*Id.*)

15) Plaintiffs are all Kansas district court judges, three of whom are chief judges of their respective districts: Chief Judge Robert Fairchild of the 7th Judicial District; Judge Jeffry L. Jack of the 11th Judicial District; Chief

Judge Meryl D. Wilson of the 21st Judicial District, and Chief Judge Larry T. Solomon of the 30th Judicial District. (Fairchild Petition at 1.)

Accordingly, Plaintiffs urge this Court to enter summary judgment (1) declaring HB 2005's non-severability provision unconstitutional as a violation of the separation-of-powers of doctrine, a violation of Article III, Section 13 of the Kansas Constitution, and a violation of Article XI, Section 4 of Kansas Constitution and (2) finding that the rest of HB 2005 remains in full force and effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2015, a true and correct copy of the above and foregoing was electronically filed with the Clerk of the Court by using the eFlex System, which will send notice of electronic filing to the following:

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