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No. 114,573

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IN THE
SUPREME COURT OF THE
STATE OF KANSAS

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LARRY T. SOLOMON, CHIEF JUDGE,
30TH JUDICIAL DISTRICT OF THE STATE OF KANSAS
Appellee,

v.

STATE OF KANSAS
Appellant.

_____

OPPOSITION TO STATE'S MOTION FOR RECUSAL

_____

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

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TABLE OF CONTENTS

Page(s)

Background

On September 2, 2015, District Court Judge Larry D. Hendricks issued a Memorandum Decision and Order granting Plaintiff's Motion for Summary Judgment, and ruled that Section 11 of Senate Substitute for House Bill 2338 (hereinafter "HB 2338"), was an unconstitutional violation of the separation-of-powers doctrine. Based on the non-severability clause contained in the statute, Judge Hendricks declared the entire statute void.

Shortly thereafter, Chief Justice Lawton R. Nuss, in response to inquiry from the press, reportedly indicated that he did not believe it would be necessary for the entire Supreme Court to recuse itself from hearing this appeal. *See* John Hanna, *Kansas Supreme Court May Review Case Dealing With Its Own Power*, ASSOCIATED PRESS, Sept. 3, 2015, http://cjonline.com/news/2015-09-03/kansas-supreme-court-may-review-case-dealing-its-power. He cited the Rule of Necessity. On September 18, 2015, Attorney General Derek Schmidt announced to the press that he would formally request recusal of the entire Supreme Court. *See* Dion Lefler, *Kansas attorney general will ask Supreme Court justices to step aside on court-power case*, Sept. 18, 2015, http://www.kansas.com/news/politics-government/article35757438.html.

Now, nearly two months later, in the midst of merits briefing on an expedited schedule, after the case has been calendared for oral argument, the State has finally moved for recusal. At its best, the State's motion is untimely and unpersuasive. At its worst, it materially misleads this Court, requiring Chief Judge Solomon's counsel to divert resources to correct its material omission of a relevant section of the statute at issue and the lack of disputed material facts in this case. For the reasons set forth below, the State's motion for recusal should be denied.

Argument

The State presents three arguments in support of its extraordinary request that the entire Supreme Court step aside from this dispute. First, the State claims that because the case involves this Court's own administrative authority, the Court cannot impartially adjudicate the dispute. The State claims this case must instead be resolved by the Court of Appeals. Second, the State claims that the Chief Justice's testimony to the legislature and his subsequent public statements regarding HB 2338 require recusal of this entire Court. Third, the State claims that the nature of Chief Judge Solomon's relationship with the Court involves disputed issues of fact, and also requires disqualification of this Court. On each of these arguments, the State is wrong.

First, the State is wrong that the mere fact that a case implicates this Court's authority means that the Justices are biased, or creates a reasonable appearance of bias that would require disqualification of the entire Court. To the contrary, centuries of precedent make clear that it is the province and duty of this Court to decide cases that involve the scope of the Court's authority, jurisdiction, and duties vis-à-vis the other branches of government.

Second, the State is wrong that Chief Justice Nuss's statements regarding HB 2338 require his recusal here, let alone recusal of this entire Court. It is the Chief Justice's responsibility to publicly address issues involving judicial administration and to inform the legislature of how pending legislation might affect the courts. Moreover, case law and Kansas's Code of Judicial Conduct make clear that judges may speak on issues without a presumption in favor of recusal, provided they do not make pledges, promises, or commitments to decide in a particular manner, or create the appearance thereof. As discussed below, nothing in the statements at issue approach a pledge, promise or

commitment. Moreover, there is no justification for using the statements of one judge to justify the recusal of others.

Third, the State's claim that Chief Judge Solomon's longstanding working relationship with this Court requires recusal in this case is specious and misleading. Despite the State's attempt to manufacture disputed material facts, this case presents a purely legal question regarding the separation of powers in this state. The particulars of Chief Judge Solomon's relationship with this Court are relevant only to his standing to bring this case, and were not relied upon in the district court's opinion below. Accordingly, Chief Judge Solomon's working relationship with this Court presents no basis for recusal in this case.

More important, the Rule of Necessity requires this Court to hear the appeal in this case, lest the parties be unconstitutionally denied a forum. The State's argument that only the judges of the Court of Appeals may hear this case is founded on a material misrepresentation of the challenged law—specifically, its omission of any mention that HB 2338 also impacts the selection of the Chief Judge of the Court of Appeals. In other words, any minimal risk of impartiality with respect to the challenged law applies to all the judges in the state. Since the Rule of Necessity requires there to be a forum to resolve Chief Judge Solomon's claim, and since Kansas law specifically provides that this Court is the appropriate body to hear appeals when statutes are found unconstitutional, this Court should hear the appeal in this case.

I. The State Has Not Demonstrated Bias, a Reasonable Appearance of Bias, or Prejudgment Necessitating That the Entire Court Step Aside from This Case

Under Kansas's Code of Judicial Conduct, a judge should step aside from a case where an impermissible appearance of impropriety exists. While recusal is an important

measure for the protection of judicial integrity, it is not required based on the facts in this dispute, which presents a pure question of law regarding the separation of powers in Kansas. It is entirely appropriate that the state's highest court resolve this dispute.

A. It is Both Appropriate and Necessary for This Court to Hear Cases That Involve the Scope of the Court's Authority Vis-à-vis the Other Branches of Government

As an initial matter, any suggestion by the State that recusal by the Supreme Court is warranted simply because "the scope and nature of this Court's institutional power is the ultimate issue in this case" is squarely at odds with centuries of precedent and with this Court's constitutional obligations. As Justice Marshall forcefully articulated in *Marbury v. Madison*, the seminal case concerning the scope of judicial authority, "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Under the Kansas Constitution, as under the United States Constitution, courts are responsible for defining their own authority vis-à-vis the other branches of government. As this Court recently underscored:

> We have long-recognized that the doctrine of separation of powers is inherent in the structure of the people's constitution. See *Coleman v. Newby*, 7 Kan. 82, 87, 1871 WL 696 (1871) (Kansas Constitution creates three "distinct and separate" branches of government); *State ex rel. Anderson v. Shanahan*, 183 Kan. 464, 469, 327 P.2d 1042 (1958) ("our constitution ... is the fundamental law of the people") (citing *Prohibitory–Amendment Cases*, 24 Kan. 700, 707, 1881 WL 748 [1881]). The doctrine generally means that " 'the legislature makes, the executive executes, and the judiciary construes the law." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883, 179 P.3d 366 (2008) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 46, 6 L.Ed. 253 [1825]).
>
> **Whether a statute is unconstitutional because it violates the separation of powers doctrine is for this court to determine**. Because, as we reaffirmed just last year, "the final decision as to the

> constitutionality of legislation rests exclusively with the courts ... [T]he judiciary's sworn duty includes judicial review of legislation for constitutional infirmity.' [Citation omitted.]"

State of Kansas v. Buser, No. 105,982, 2015 WL 4646663, at *1 (July 1, 2015) (quoting *Gannon v. State*, 298 Kan. 1107, 1159, 319 P.3d 1196, 1230 (2014)) (emphasis added) (statute directing attorneys to seek expedited judicial decisions following expiration of certain deadlines violated separation of powers).[1]

The mere fact that HB 2338 raises a separation of powers dispute between the judiciary and the political branches and affects the administrative powers of this Court does not justify requiring the entire Supreme Court to step aside from this case. Far from being inappropriate, hearing this case would further the mandates and values of the Kansas Constitution and law, which establish this Court as the state's highest court and final adjudicator of issues of state law and require it to hear all appeals from rulings regarding the unconstitutionality of statutes. Article III of the Kansas Constitution vests this Court with power as the state's highest court, and K.S.A. 60-2101 directs that, "[a]n 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." It would go against the express direction of K.S.A. 60-2101 for this

[1] Indeed, a court determines the scope of its own authority every time it considers jurisdiction to hear a case. *See, e.g.*, *Sedlak v. Dick*, 256 Kan. 779, 782, 887 P.2d 1119, 1123 (1995) (finding that this Court had original jurisdiction); *State v. Thomas*, 239 Kan. 457, 459, 720 P.2d 1059, 1062 (1986) (finding that this Court had original jurisdiction); *State Auditor v. Atchison, T. & S. F. R. Co.*, 6 Kan. 500, 501-02 (1870) (finding that this Court did not have jurisdiction in the case because the instant matter did not fall into the three classes of cases creating original jurisdiction or its appellate jurisdiction).

Court to step aside in favor of the Court of Appeals, which K.S.A. 60-2101 removes entirely from hearing appeals of decisions striking down statutes as unconstitutional.

B. Nothing in the Statements Opposing HB 2338 As a Matter of Policy Identified by the State Violates Any Ethical Rule or Demonstrates Close-mindedness with Respect to the Law's Constitutionality

The State argues that the entire Supreme Court must step aside from this case because this Court issued a press release expressing the view that the Court "strongly opposes" HB 2338. (State Mot. at 12.) The press release addressed the wisdom of HB 2338's impact on judicial administration, did not express a view regarding the constitutionality of HB 2338, and did not pledge, promise, or commit this Court to any particular result in the event that a constitutional challenge to HB 2338 may appear before this Court. Nor did it appear to do so.

The State appears to suggest that the mere fact that a justice expresses a policy opinion on a matter renders that justice unable to rule on the constitutionality of that matter. That argument has no precedent and would clearly be overbroad. There is no basis to challenge this Court's open-mindedness or impartiality with respect to the law's constitutionality. Judges are able to distinguish between the wisdom of a particular law and the legislature's constitutional authority to enact it. In short, dumb laws are not necessarily unconstitutional, and judges are well aware of this. *See, e.g. New York State Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 209 (2008) (Stevens, J., concurring) ("[A]s I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws.'"). Indeed, Comment [2] to Rule 2.2 of Kansas's Code of Judicial Conduct specifically recognizes that, "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without

regard to whether the judge approves or disapproves of the law in question." KS R RULE 601B CJC Cannon 2, Rule 2.2. The State has identified no reason to suggest any member of this Court will violate this ethical obligation.

The State is wrong in implying that judges are not permitted to express their views on policy matters. The United States Supreme Court emphasized this in *Republican Party of Minnesota v. White*, striking down the "announce clause" of the state's Code of Judicial Conduct, which prohibited a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." 536 U.S. 765, 768 (2002) (noting that "it is virtually impossible to find a judge who does not have preconceptions about the law.").[2] While the *White* case is not dispositive regarding when recusal is warranted, the case weighs against recusal.

The statements identified by the State are in keeping with Kansas's Code of Judicial Conduct, which permits judges to engage in conversation regarding issues, particularly regarding judicial administration and the law. Comment [6] of Rule 1.2 of the Code of Judicial Conduct allows a judge to "initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice." KS R RULE 601B CJC Cannon 1, Rule 1.2. When faced with a proposed law that would, in a judge's opinion, hamper the administration of

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[2] Comment [15] of Rule 4.1 of Kansas's Code of Judicial Conduct allows judicial candidates to respond to questionnaires regarding their views on disputed or controversial legal or political issues, as long as the response is not a pledge, promise or commitment to rule on those issues other than impartially. KS R RULE 601B CJC Cannon 4, Rule 4.1. The Chief Justice's public comments may suggest that he did not believe HB 2338 was wise public policy, but the State can point to no statement that even approaches a pledge, promise, or commitment.

justice, it is appropriate for a judge to educate the public about the impact of the bill, provided the judge (as did the Chief Justice) does so in an ethical manner. Rule 3.2 of Kansas's Code of Judicial Conduct allows judges to appear before, or otherwise consult with, an executive or legislative body with regard to matters concerning the law, the legal system, and the administration of justice. KS R RULE 601B CJC Cannon 3, Rule 3.2. The Chief Justice's public comments are a logical extension of, and in keeping with, the rule. This Court has also emphasized the distinction between potential partiality regarding issues and bias for or against a party to litigation, the latter being the traditional basis for disqualification:

> The rule generally followed throughout the United States is that the words "bias" and "prejudice," as used in connection with the disqualification of a judge, refer to the mental attitude or disposition of the judge toward a party to the litigation and not to any views that he might entertain regarding the subject matter involved. Bias and prejudice mean a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward one. [Citations omitted.] K.S.A. 20–311d(b)(5) specifies that personal bias, prejudice, or interest is ground for disqualification. This requires antagonism and animosity toward the affiant or his counsel or favoritism towards the adverse party or his counsel. "Personal bias" is to be distinguished from "judicial bias," and does not include views based upon matters arising during the course of the litigation or upon general attitudes common to the public generally. Views relating to legal questions, even strongly-held views in favor of law enforcement, do not amount to personal bias. *United States v. Nehas*, 368 F.Supp. 435 (W.D.Pa.1973); *Knapp v. Kinsey*, 232 F.2d 458, 466 (6th Cir. 1956); *Antonello v. Wunsch*, 500 F.2d 1260 (10th Cir. 1974).

State v. Foy, 227 Kan. 405, 411, 607 P.2d 481, 487 (1980) (holding that a judge's views toward law enforcement and criminal defendants did not necessitate recusal).[3] There is

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[3] Courts have repeatedly found that judges' discussion of issues need not result in disqualification when, as here, the judge's statements did not raise a reasonable concern of impartiality. *See, e.g. In re City of Milwaukee*, 788 F.3d 717, 723 (7th

nothing to suggest that this Court holds any favoritism towards Chief Judge Solomon beyond the normal working relationship between chief district judges and members of this Court, nor anything to suggest any member of this Court is personally biased or prejudiced against the State.

C. *Caperton* Is Completely Inapposite

The State argues that, in addition to Kansas's Code of Judicial Conduct, the entire Supreme Court must step aside because the State's Due Process rights would be violated, as articulated by the United States Supreme Court in *Caperton v. Massey*. (State Mot. at 14-17.) While *Caperton* is an important case demonstrating that large campaign spending in judicial elections can pose a dire risk to judicial integrity,[4] the case is simply inapposite to this dispute. In *Caperton*, the plaintiff in a pending dispute worth tens of millions of dollars spent an extraordinary amount of money in support of a successful candidate for Justice of the West Virginia Supreme Court, who subsequently cast the deciding vote in favor of his contributor. In this case, there are no "extraordinary efforts"

Cir. 2015) (judge's comments regarding legislature's failure to address "systemic problems" when implementing its strip-search policy or custom are not necessarily prejudging the lawfulness of the policy or custom); *State v. Peralta*, 175 Ariz. 316, 319, 856 P.2d 1194, 1197 (Ct. App. 1993) (judge's observations about his experience with the department of corrections and his opinion of their policy was the type of common sense consideration based on life experience that was not grounds for recusal).

[4] *See* Adam Skaggs and Andrew Silver, Brennan Center for Justice, *Promoting Fair and Impartial Courts through Recusal Reform* 3 (2011) (explaining that substantive and procedural recusal rules can "protect due process and reassure citizens that their courts are fair and free of actual or apparent partiality"); James Sample, David Pozen and Michael Young, Brennan Center for Justice, *Fair Courts: Setting Recusal Standards* 5, 35 (2008) (explaining that stronger recusal rules have the potential to provide litigants with greater due process protection and enhance judicial accountability and independence).

by any party or attorney that raise the specter of a "debt of gratitude." Chief Judge Solomon is not responsible for the election of any members of this Court and has provided no personal benefit to any one of them. If Chief Judge Solomon had not brought this lawsuit, someone else likely would have. Again the State's argument proves too much.

D. The Rule of Necessity Requires This Court to Hear This Case

Because HB 2338 makes administrative changes to all levels of the unified court system in Kansas, every judge in the state would be impacted were the law to take effect. But that does not mean that no judge can resolve this dispute. Under the Rule of Necessity, it is well-established that when litigation would impact any judge who might hear the case, it is not necessary for the judge or judges assigned to the case to step aside. S*ee* Comment [3] of Rule 2.11 of Kansas's Code of Judicial Conduct (providing that, "[t]he rule of necessity may override the rule of disqualification," and recognizing the example of judicial salary disputes as one such instance). Thus, for example, the Rule of Necessity prevents disqualifications in disputes regarding unconstitutional diminution of judicial salaries. *See United States v. Will*, 449 U.S. 200, 201 (1980) (challenge to statutes reducing judicial compensation); *Beer v. United States*, 696 F.3d 1174, 1179 (Fed. Cir. 2012) (challenge to legislation blocking judicial cost of living increases). Since a ruling in this case would impact all Kansas judges, the same is true here.

The State attempts to avoid the Rule of Necessity by insisting that judges of the Court of Appeals are uniquely immune from impact under the challenged law and thus should be assigned to hear this appeal. *See* State Mot. at 21 (claiming that "[t]he only acceptable option" in this dispute is "appointing judges of the Kansas Court of Appeals to decide this dispute."). The State suggests that the justices of this Court and all district

court judges are affected and thus conflicted, but that appellate judges are not. *Id*. at 20. However, the State neglects to bring to this Court's attention Section 22 of HB 2338, which provides, in relevant part, that:

> K.S.A. 20-3011 is hereby amended to read as follows: 20-3011. The ~~supreme court~~ *court of appeals judges* shall ~~designate~~ *elect* a judge of the court of appeals to serve as chief judge of such court ~~at the pleasure of the supreme court~~. *The procedure for such election shall be determined by the court of appeals*.

(italics and strikethroughs in original). Under this section, the legislature stripped this Court of the authority to select the Chief Judge of the Court of Appeals, just as it did with respect to district courts, and conferred upon the Court of Appeals the authority to elect its own Chief Judge, through means selected by the Court of Appeals. The State's own logic regarding the alleged conflict faced by district court judges applies with equal force to the judges on the Court of Appeals. As the State's brief repeatedly emphasizes, as a result of the legislature's non-severability clause, "striking down *any* provision the law [sic] . . . will invalidate the entire bill . . . ." (State Mot. at 13) (emphasis in original). By omitting this critical portion of the statute, the State materially misleads the Court. *See* State Mot. at n. 5, 18 ("In a judicial salary case, unlike here *all* judges would be potentially affected by the outcome. But here, the judges of the Court of Appeals are *not* directly affected by whether the Kansas Supreme Court or local district court judges select the chief judge in each judicial district.") (emphasis in original). Section 22 is fatal to the State's argument that judges on the Court of Appeals must hear this case.

Because all Kansas judges are affected by the challenged law, the Rule of Necessity requires judges who might otherwise consider stepping aside to hear this case, or Chief Judge Solomon will be unconstitutionally denied a forum. *See United States v.*

Will, 449 U.S. 200 (1980) (challenge to judicial salary diminution). Since Kansas law specifies that appeals of rulings striking down statutes as unconstitutional are to be decided by the Supreme Court, it is appropriate for the justices of this Court to decide this case.

II. Chief Justice Nuss's Public Comments Do Not Suggest Bias or Prejudgment and Should Not Require Recusal

Under Kansas's Constitution, statutes, and Code of Judicial Conduct, the Chief Justice has dual responsibilities. He is charged with hearing and deciding cases. He is also charged with administering the judicial branch, and representing the judiciary in conversations with the public, and with the legislative and executive branch, particularly on the topic of judicial administration. For example, both K.S.A. 20-101 and K.S.A. 20-158 grant specific authority with regard to judicial administration and with judicial budgetary and financial affairs. The Chief Justice was addressing these topics in the materials cited by the State, and was careful to refrain from even mentioning the constitutionality of the statute. In his role as Chief Justice, it is entirely unremarkable that Chief Justice Nuss had opinions regarding proposed legislation impacting the administration of the unified court system, and that he was more outspoken than other judges. His statements were well within the range of judicial expression regarding legal issues, as expressed in Kansas's Code of Judicial Conduct and existing United States Supreme Court precedent.

While the State makes much of certain statements made by the Chief Justice regarding the wisdom of HB 2338, (State Mot., *passim*), the State cannot ignore or escape the most important thing the Chief Justice wrote: "I express no opinion on the constitutionality of the package because if it is challenged in a lawsuit the Supreme Court

may need to answer that question." (State Mot. at 11.) The State's only response is to state that the Chief Justice "ostensibly" made this claim. (*Id.*). Chief Judge Solomon's review of the State's Exhibit C confirms that the Chief Justice did, in fact, expressly state that he was not expressing any opinion on the constitutionality of HB 2338. Reasonable people would take Chief Justice Nuss at his word, and would not believe that Chief Justice Nuss is unable to be open-minded in considering this case.

Reasonable people would believe that the Chief Justice is not likely to be partial or biased because it is not merely reasonable for the Chief Justice to speak publicly regarding issues of judicial administrative, it is expected of him. Indeed, communication between the Chief Justice, the public, and the other branches of government is critical to democracy in Kansas.

III. The Factual Particulars of Chief Judge Solomon's Relationship with This Court Are Irrelevant and Do Not Necessitate Recusal

The State claims that supposed "factual issues in dispute" provide an independent reason for the entire Court to step aside from this case. The State is wrong because there are no disputed facts within this Court's personal knowledge that are relevant to this appeal. The district court's opinion did not rely on Chief Judge Solomon's affidavit to find HB 2338 unconstitutional, and this Court can do the same.

The details of Chief Judge Solomon's relationship with this Court, whether or not they are disputed, are legally irrelevant to this appeal, which concerns the constitutionality of a statute.

The only issue to which Chief Judge Solomon's relationship with this Court could potentially be relevant is standing. Chief Judge Solomon's standing does not turn on the extent to which his relationship with the Court was positive. The State complains that

"the District Court declined to permit the State any discovery" regarding Chief Judge Solomon's relationship with this Court (State Mot. at 6), but that was a problem of the State's own making. The State not only failed to submit the declaration or affidavit required under K.S.A. 60-256(f) to establish a disputed issue of material fact, it also completely failed to identify any facts that could potentially raise a disputed issue of fact as required to prevent summary judgment. *See* R. III, 41-46.

Importantly, the district court's opinion below did not rely on any of the factual matters contained in Chief Judge Solomon's affidavit. This Court similarly may decide this case without relying on those factual matters, and no member of this Court need recuse themselves on that basis.

CONCLUSION

The State is certainly correct about one thing—a fair, impartial, and independent judiciary is essential for our democracy. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (holding that states have a "compelling interest in judicial integrity"); *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (stating "[i]t is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process"); *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (declaring that judicial integrity is a "state interest of the highest order"); *In re Gault*, 387 U.S. 1, 26 (1967) (finding that "the appearance as well as the actuality of fairness, impartiality and orderliness [are] essentials of due process"). The State is also correct that recusal is an important tool that, when warranted, helps maintain judicial integrity.

But the risk to judicial integrity in this dispute stems not from the participation of the justices of this Court, but from HB 2338 itself (and HB 2005, which Chief Judge Solomon, along with other judges, is challenging in a separate lawsuit). This case is

about the separation of powers, the independence of the state's judiciary, and the will of the people of Kansas as expressed through the Kansas Constitution. This lawsuit was filed to protect these important values. This Court should deny the State's motion, and move to the merits of this case: Will the authority of the judiciary as a separate and coequal branch of government be upheld, or will the legislature be allowed to intrude upon core judicial administrative functions in contravention of the express will of the people of Kansas that the judiciary be organized as a unified court system and administered by this Court?

For the reasons herein, Chief Judge Solomon respectfully requests that this Court deny the State's motion, and grant whatever additional relief this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 17th day of November 2015, a copy of the above was electronically transmitted via the Court's electronic filing system, electronically mailed, and mailed postage prepaid to:

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