IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

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

Plaintiff,

vs.

THE STATE OF KANSAS,

Defendant.

Case No. 2015-CV-156

Division 6

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

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Plaintiff, Chief Judge Larry Solomon of the 30th Judicial District (hereafter Chief Judge Solomon), submits this memorandum in opposition to the State's motion to dismiss and in support of his cross-motion for summary judgment (1) declaring Section 11 of House Bill ("HB") 2338 unconstitutional as a violation of the separation-of-powers doctrine, and (2) invalidating HB 2338 in its entirety based on the statute's non-severability provision. The State concedes that "a declaration that Section 11 is unconstitutional will invalidate the entire bill." (State Mem. at 2.)

PRELIMINARY STATEMENT

The State contends that this case must be dismissed because Section 11 is not a "significant interference" with the Supreme Court's constitutional authority to administer Kansas' unitary court system and, thus, is not proscribed by the separation-of-powers doctrine. (State Mem. at 5-16.) Alternatively, the State seeks dismissal on justiciability grounds: According to the State, Chief Judge Solomon lacks standing to sue to invalidate Section 11 because the provision has not caused or threatened to cause him "personal and particularized" injury and, in any event, the dispute over Section 11's constitutionality is not ripe for adjudication. (State Mem. at 3-5.) The State is wrong on all counts.

Section 11 certainly interferes with the Supreme Court's constitutionally granted authority. Shortly after the "People's Constitution" was adopted in 1972, investing the Supreme Court with "general administrative authority of all courts in this state," Article III, Section 1, the Court promulgated Kansas Supreme Court Rule 107 (hereinafter "Rule 107".) That Rule delegates the Supreme Court's administrative responsibility for the State's district courts to the chief judge of each district and enumerates the "duties and administrative powers" with which the Supreme Court entrusts them. Inherent to this delegation, Rule 107 provides that the

Supreme Court shall choose whom to appoint as the chief judge of each district. As described in Judge Solomon's affidavit, attached hereto:

> Because the Supreme Court delegates to the chief judges a portion of its constitutionally granted administrative authority over the unified court system, the Court needs to have confidence in a chief judge's administrative capability, and honesty, as well as trust that he or she can keep certain matters confidential. In the past, the Supreme Court has removed chief judges who were unable to meet these expectations. Section 11 of 2014 Senate Substitute for House Bill No. 2338 severs this relationship that is so important to the effective administration of the district court system.[1]

For almost four decades, the Supreme Court has determined which district court judges it deems best suited to serve as the Court's administrative delegates under Rule 107. Section 11 seeks to wrest that delegation of administrative authority from the Court and, in the name of "peer selection" (State Mem. at 14-16), entrust it to a vote of the judges in each district. But as the State concedes, "a bill that significantly interferes with the Kansas Supreme Court's administrative authority surely cannot be salvaged by a worthy motive." (*Id.* at 13.) And it could not be clearer that Section 11 represents just such a significant interference. Indeed, because Section 11 "fall[s] within the realm of action by the legislature which attempts to control or dictate the internal, administrative functions of other branches," it constitutes "*a clear encroachment upon and violation of the separation of powers doctrine.*" *State v. Greenlee*, 228 Kan. 712, 719, 620 P.2d 1132, 1138 (1980) (emphasis added).

The State argues that "the Legislature regulates court administration and procedure all the time" and, therefore, "it is clear that authority . . . is not vested exclusively in the Kansas Supreme Court." (State Mem. at 7.) But in each of the of the instances the State cites, the Supreme Court elected to acquiesce in the Legislature's actions rather than to exercise its

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[1] Affidavit of Larry T. Solomon ("Solomon Afft.") ¶ 6.

constitutional grant of administrative authority over the judiciary through the rule-making process. As the Supreme Court made clear in *State v. Mitchell*, 234 Kan. 185, 195, 672 P.2d 1, 9 (1983), even when the Court acquiesces in legislation that deals with matters of judicial administration, "[t]he constitutional power over court administration and procedure *remains vested in the judicial branch.*" (Emphasis added.)

In contrast to the State's examples, when the Court decides to exercise its constitutional authority by promulgating administrative rules like Rule 107, the Legislature is prohibited by the separation-of-powers doctrine from enacting contrary legislation. Where, as here, the Legislature acts in direct contravention of a Supreme Court rule dealing with judicial administration—which it indisputably did by passing Section 11—*Mitchell* holds that "the court's constitutional mandate *must prevail.*" *Id.* (emphasis added). While the State contends that this statement is nothing but *dictum* and thus should be disregarded (State Mem. at 6-7), an objective analysis of *Mitchell*'s rationale demonstrates that the Supreme Court was articulating the necessary corollary to its "acquiescence" holding and, as such, it constitutes binding precedent that compels the invalidation of Section 11. And even if only *dictum,* it is a well-considered statement of law by a unanimous Supreme Court that is entitled to be treated as persuasive authority.

Equally unfounded is the State's contention that Chief Judge Solomon lacks standing to seek a declaration of invalidity because he allegedly has asserted no more than an "institutional injury" that does not distinguish him from every other district court judge or the general public. (State Mem. at 4.) The State's justiciability arguments are premised on a mischaracterization of Chief Judge Solomon's injury. Section 11 disrupts a long-standing professional relationship of trust and confidence between the Supreme Court and Chief Judge Solomon, who the Court has

repeatedly reappointed to serve as its surrogate to discharge Rule 107's administrative responsibilities for the 30th Judicial District. At the same time, Section 11 alters Chief Judge Solomon's relationship with his peer judges of the 30th Judicial District, who will now be responsible for deciding whether he retains his position as chief.

These changed relationships go well beyond "institutional," "generalized" damage. Instead, they constitute "personal and particularized" injury (*see* State Mem. at 4), that endows Chief Judge Solomon with standing to challenge Section 11. This is especially true because "standing rules are relaxed" where, as here, "only a declaration of legal rights is sought." *Hartman v. City of Mission*, 43 Kan. App. 2d 867, 869, 233 P.3d 755, 758 (2010). Moreover, the injury to Chief Judge Solomon's close working relationship with the Supreme Court—as well as the change in his relationship with his fellow judges of the 30th Judicial District—occurred as soon as Section 11 became law, thus making this dispute ripe for resolution.

Importantly, Chief Judge Solomon and the State do agree on one thing: "The relevant facts in this matter are not in dispute." (State Mem. at 2.) Accordingly, this case is ripe for summary judgment. Therefore, we urge the Court not only to deny the State's motion to dismiss for the reasons set forth below, but also to grant Chief Judge Solomon's cross-motion for summary judgment (1) invalidating Section 11 of HB 2338 as an unconstitutional breach of the separation-of-powers doctrine, and (2) invalidating HB 2338 in its entirety on the basis of the enactment's non-severability provision.

I. BACKGROUND

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

Prior to 1972, the administration of the Kansas judicial system was badly fragmented and there was no consensus as to whether the Supreme Court possessed the overall authority to

administer it. *See, e.g.*, Spencer A. Gard, *Procedure by Court Rules*, 5 U. Kan. L. Rev. 42 (1957). At the time, the State Constitution did not explicitly grant that authority to the Supreme Court. Nevertheless, some legal experts maintained that the authority was inherent under the separation-of-powers doctrine. *Id.* at 45 (the legislature "exceeds its constitutional power when it attempts to impose on the judiciary any rules for the dispatch of judiciary duties").

Any uncertainty was eliminated by the 1972 amendment to Article III, Section 1, of Kansas's Constitution, which vested the judicial power of the State in "one supreme court, district courts, and such other courts as are provided by law." To administer that unified system, Article III, Section 1 was also amended to grant the Supreme Court "general administrative authority over all courts in this state." As the Supreme Court declared in *Mitchell*: "It is apparent from the unambiguous words of the constitution that the judicial power of Kansas is vested *exclusively* in the unified court system." 234 Kan. at 194, 672 P.2d at 8 (emphasis in original).

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

As observed by the Judicial Study Advisory Committee, the group tasked with making recommendations to implement the unified court system mandated by the amendment of

Article III, Section 1, the people of Kansas have "*wisely vested ultimate administrative authority over Kansas courts in the supreme court*" consistent with "sound principles of judicial administration." Edward F. Arn, et al., *Recommendations for Improving the Kansas Judicial System*, 13 Washburn L. J. 271, 363-64 (1974) (emphasis added).

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

On July 28, 1976, the Supreme Court, in a clear exercise of its "general administrative authority over all courts in this state," promulgated Rule 107, which designated the chief judge of each judicial district to act as the Supreme Court's surrogate in discharging many of the administrative duties for his or her district. These include:

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

Since its promulgation, Rule 107 has always provided that the selection of chief judge for each judicial district is left to the judgment of the Supreme Court. The reservation of this choice to itself reflects the seriousness with which the Supreme Court views its constitutional obligation to administer Kansas's judiciary: In carrying out Rule 107's administrative duties and responsibilities, each chief judge is acting as the Supreme Court's surrogate in discharging its Article III, Section 1 mandate to administer the State's unified court system. Rule 107 reflects the Supreme Court's judgment that the Court itself should decide which judges are best equipped to serve as its administrative delegates. As Chief Justice Solomon explains: "The relationship between the Supreme Court and the chief judge involves a significant level of communication, trust and candor that greatly exceeds the relationship that other members of the bench have with the Supreme Court."[2]

C. Chief Judge Solomon's Close Working Relationship with the Supreme Court

Judge Solomon was first appointed by the Supreme Court as chief judge of the 30th Judicial District on July 1, 1991, and has been reappointed bi-annually by the Court ever since—a tenure that approaches a quarter of a century. Indeed, he is the longest serving active chief judge in the Kansas district court system.[3] During this period, Chief Judge Solomon has obviously earned the trust and confidence of the Supreme Court in discharging his administrative duties and responsibilities under Rule 107, including dealing with budget and personnel issues as well as with County Commissions, the press and the public.[4] Chief Judge Solomon's attached

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2 Solomon Afft. ¶ 3.

3 *Id.*, ¶ 1.

4 Solomon Afft. ¶¶ 2, 7.

affidavit explains just how special the relationship is between a district court chief judge and the Supreme Court:

> Chief judges meet with the Supreme Court at least twice a year to privately discuss staffing, Judicial Branch budget, and most importantly Legislative Agenda and other legislative issues, including strategies for working harmoniously with the Legislature. These discussions are candid and, in many instances, must be kept confidential. Additionally, we have had special meetings with the Supreme Court over the past few years regarding recurrent budget shortfalls and furloughs. On two occasions I was asked by the Supreme Court to lead the discussion among the chief judges, prior to the Court conferring with us.[5]

D. Section 11 Alters Chief Judge Solomon's Long-standing Professional Relationship with the Supreme Court

By wresting from the Supreme Court the right to choose who it believes is best equipped to serve as its administrative surrogate in each Judicial District, Section 11 has already injured Chief Judge Solomon by disrupting his long-standing working relationship with the Supreme Court. To be sure, his colleagues in the 30th Judicial District might vote for Judge Solomon to continue as chief judge after January 1, 2016, but that is not the point. Once Governor Brownback signed HB 2338 into law on July 1, 2014, Chief Judge Solomon's close professional relationship with the Supreme Court was substantially altered, as the trust and confidence he built with the Court over decades will no longer have direct bearing on his reappointment as chief judge. Instead, his fellow judges of the 30th Judicial District will now make that determination. In other words, Section 11 has changed his relationship with those judges as well.

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[5] Solomon Afft. ¶ 4.

II. ARGUMENT

A. Section 11 Violates the Separation-of-Powers Doctrine and Is Thus Unconstitutional

1. Section 11 Constitutes Significant Interference with the Supreme Court's Exercise of Its Constitutional Authority to Administer the Kansas Judiciary

Although the Kansas Constitution, like the federal Constitution, contains no express provision adopting the doctrine of separation of powers, it has long been recognized that the doctrine is inherent in "the very structure of the three-branch system of government." *Stephan v. Kansas House of Representatives*, 236 Kan. 45, 59, 687 P.2d 622, 634 (1984). "[T]he separation of powers doctrine is an inherent and integral element of the republican form of government." *Van Sickle v. Shanahan*, 212 Kan. 426, 447, 511 P.2d 223, 241 (1973). As the Supreme Court explained in *Stephan*:

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

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

There is no talismanic formula for determining whether one branch's encroachment on another's domain violates the separation-of-powers doctrine. The Kansas courts have taken a "practical" rather than a "theoretical" approach to the question. *Leek v. Theis*, 217 Kan. 784, 805, 539 P.2d 304, 322 (1975). "We must search for usurpation by one department of the powers of another department on the specific facts and circumstances presented." *Id.* We have no quarrel with the State over the tipping point for an unconstitutional usurpation—there must be "significant interference" by one branch with the operations of another. (State Mem. at 10.)

On the specific facts and circumstances of this case, it should be obvious why Section 11 amounts to a significant interference with the Supreme Court's Article III, Section 1 authority to administer the Kansas judiciary. When the Supreme Court decides that it should choose the district court judges who it deems best qualified to act as its surrogates in carrying out Rule 107's administrative duties and responsibilities for each judicial district, there could hardly be a more significant encroachment on the Court's administrative prerogatives than an enactment which seeks to wrest that choice from the Court. As the Supreme Court has made clear, "action by the legislature which attempts to control or dictate the internal administrative functions of other branches," constitutes "*a clear encroachment upon and violation of the separation of powers doctrine.*" *Greenlee*, 228 Kan. at 719, 620 P.2d at 1138 (emphasis added).

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

Section 11 is not only unconstitutional under general separation-of-powers principles, but it also runs afoul of the square holding in *State v. Mitchell*, 234 Kan. 185 at 195, 672 P.2d at 9, that when the Legislature directly contravenes an administrative rule promulgated by the Supreme Court pursuant to its Article III, Section 1 mandate, the Court's rule "must prevail" under the separation-of-powers doctrine. Although the State seeks to devalue this statement by characterizing it as dictum (State Mem. at 6-7), an examination of the Supreme Court's legal analysis in *Mitchell* makes it crystal clear that the statement is a necessary corollary of its separation-of-powers ruling and, as such, constitutes binding precedent.

In *Mitchell*, the trial court ruled that the statute at issue governing jury selection was a violation of the separation-of-powers doctrine and, therefore, refused to follow it. As the Supreme Court framed the question: "At issue is whether the Supreme Court has exclusive constitutional power to make rules pertaining to court administration and procedure." 234 Kan.

at 193, 672 P.2d at 8. According to the Supreme Court, the answer to that question "requires an examination of the doctrine of separation of powers" and "the source and extent of judicial power in Kansas." *Id.* at 193-94, 672 P.2d at 8. There could not have been a clearer indication that what was to follow was the legal framework for the Supreme Court's resolution of the issue before it.

The Supreme Court began its analysis by quoting Article III, Section 1 of the Constitution, as amended in 1972:

> The judicial power of this state shall be vested in one court of justice. . . . The supreme court shall have general administrative authority over all the courts in this state.

From these "unambiguous words," the Supreme Court concluded that "the judicial power of Kansas is vested *exclusively* in the unified court system." *Id.* at 194, 672 P.2d at 8 (emphasis in original).

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

But that did not end the Supreme Court's analysis either because, in contrast to non-delegable judicial decision-making, the Court can choose to share its administrative authority

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

Contrary to the State's contention, this was hardly a stray, unnecessary, passing remark without analysis or support. Indeed, it was an integral part of the Supreme Court's rationale, harkening back to its earlier ruling that the manner in which the Court exercises its grant of general administrative authority is through the promulgation and enforcement of "reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice." *Id.* at 194, 672 P.2d at 8. Put differently, this is simply two sides of the same coin: Where the Supreme Court chooses not to exercise its administrative authority over the judiciary, but instead shares it with the Legislature, legislative action regarding court administration is consistent with separation of powers. But where the Supreme Court chooses to exercise that authority through the promulgation of administrative rules, those rules "must prevail" over any conflicting legislation under the separation-of-powers doctrine. This is not *dictum*, but instead the Court's *ratio decidendi*, *i.e.*, "[t]he principle or rule of law on which a court's decision is founded." *Black's Law Dictionary* 1452 (10th ed. 2014).

The Supreme Court then applied this legal framework to the facts at bar and held that the statute at issue did not violate the separation-of-powers doctrine because there was no conflicting Supreme Court rule governing jury selection. "The absence of the adoption of such a rule amounts to acquiescence on the part of the judicial branch in legislation." *Mitchell*, 234 Kan. at 195, 672 P.2d at 9. This factual disposition does not render the Court's capstone statement mere *dictum* any more than it is dictum when a court announces a rule of law as to the circumstances in which one party owes a duty of care to others and then, applying the legal rule to the facts at bar, finds that no duty is owed. Take, for example, the classic common law rule of negligence that a defendant owes a duty of care only to those foreseeably within the zone of risk created by his negligent conduct—the so-called *Palsgraf* rule first articulated by Justice Cardozo when sitting on New York's highest court. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). No one has ever suggested that the *Palsgraf* rule was mere *dictum* simply because Justice Cardozo found on the facts before him that the plaintiff was not foreseeably within the zone of risk created by defendants' negligence.

The State argues that *Mitchell*'s "actual holding"—that the jury selection statute at issue did not violate the separation-of-powers doctrine—proves that administrative authority over the court system "is not vested exclusively in the Kansas Supreme Court." (State Mem. at 7.) But, as explained above, the Supreme Court's conclusion that the jury selection enactment did not contravene separation-of-powers principles was based squarely on the absence of a Supreme Court rule governing jury selection, signifying that the Court had acquiesced in the Legislature's action. *Mitchell*, 234 Kan. at 195, 672 P.2d at 9. Even in such circumstances, the Supreme Court made clear that "[t]he constitutional power over court administration and procedure

remains vested in the judicial branch even though legislation is used to help perform its function." *Id.* (emphasis added).

The State also contends that Chief Judge Solomon's reading of *Mitchell* "would give the Kansas Supreme Court a veto over an entire category of legislation." (State Mem. at 8.) Stripped of the State's hyperbolic rhetoric, however, there is nothing remarkable about the proposition that when the Supreme Court exercises its Article III, Section 1 authority by promulgating a rule that addresses a specific matter of court administration—in this case, the selection of district court chief judges—it is a violation of the separation-of-powers doctrine for the Legislature to pass a statute in direct conflict with the rule. The State argues that this "proposition [is] found nowhere in the text or structure of the Constitution." (State Mem. at 8.) But as the Supreme Court declared in *Mitchell*, the "unambiguous words" of Article III, Section 1 vest the administrative authority over the judiciary "exclusively in the unified court system," 234 Kan. at 194, 672 P.2d at 8 (emphasis in original), where it "remains vested . . . even though legislation is used to help perform its function." *Id.* at 195, 672 P.2d at 9. In this case, it is the Legislature, not the Supreme Court, which impermissibly seeks to exercise a "veto" by nullifying through Section 11 a Supreme Court rule that was validly promulgated pursuant to the Court's constitutional authority to administer the judiciary decades before the enactment of HB 2338. The Legislature cannot do this without violating the separation-of-powers doctrine.[6]

In sum, *State v. Mitchell* is controlling precedent that mandates the invalidation of Section 11 as a violation of the separation-of-powers doctrine.

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[6] To support its "veto" argument, the State conjures up a scenario in which the Supreme Court invalidates a presumptively constitutional statute by promulgating a conflicting rule after the legislation is enacted. (State Mem. at 8-9.) As explained above, this is not such a case and, therefore, it would be tantamount to an impermissible advisory opinion for the court to opine on whether facts not before it make out a separation-of-powers violation. Suffice it to say, it is unlikely that the scenario the State imagines would ever arise if the Legislature and the Supreme Court conferred in good faith in advance of considering legislation dealing with matters of judicial administration.

3. Even if Dictum, *Mitchell*'s Capstone Statement Is Persuasive Authority That Should Be Followed in This Case

In arguing that *Mitchell*'s capstone statement should be disregarded as *dictum*, the State fails to recognize that there are two types of dictum—judicial dictum and obiter dictum. Although both are unnecessary to the resolution of the case, "[t]he former carr[ies] greater authority than what are commonly referred to as mere dictum; the latter are mere dictum."[7]

> Obiter dicta are "by the way" statements. Since courts usually do not give as serious consideration to the statements they make in passing as they do ratio decidendi, the statements do not constitute the binding part of a judicial precedent. Therefore, obiter dicta are viewed as those statements by a court that can be safely ignored. *But judicial dicta are the product of a comprehensive discussion of legal issues and therefore should be granted greater weight than obiter dicta. Judicial dicta should be followed unless they are erroneous or there are particularly strong reasons for not doing so.*[8]

Significantly, the Kansas courts have recognized that certain dicta are compelling enough to be treated as "persuasive authority" that should be followed. *See, e.g., In re Stephenson and Papineau*, 49 Kan. App. 2d 457, 463, 308 P.3d 1270, 1274 (2013) ("Although the dicta in *Hohmann* and *Taber* is not controlling here, *we find that these decisions provide persuasive authority* . . . .") (emphasis added); *First Bank of Wakeeney v. Peoples State Bank*, 12 Kan. App. 2d 788, 791, 758 P.2d 236, 239 (1988) ("Courts have indicated in dicta that, in the absence of a negotiated contract term, the lead bank exercises sole control over the collection and enforcement of the loan. . . . . *We find this dicta to be persuasive and adopt it as our holding.*") (emphasis added).

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7 Robert G. Scofield, *The Distinction between Judicial Dicta and Obiter Dicta*, Los Angeles Lawyer 17 (Oct. 2002).

8 *Id.*

The State likens *Mitchell*'s capstone statement to the Court of Appeals' passing comment in *Ramsey v. Lee Builders, Inc.* about the "inappropriate" statutory bases invoked for an attorney's fee award, which the court made unmistakably clear was a gratuitous remark "in light of the conclusion already reached," *i.e.*, that there was no breach of the duty to defend that would justify attorney's fees anyway. 32 Kan. App. 2d 1147, 1158, 95 P.3d 1033, 1041 (2004). It is thus understandable that the Kansas Supreme Court subsequently labeled this remark *dictum*, cementing the point by noting that the Court of Appeals "did not analyze . . . or provide support for its conclusion." *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 861-62, 137 P.3d 486 (2006).

This, then, is a classic example of obiter dictum—a "by the way" statement made in passing. It bears no resemblance to the Supreme Court's statement in *Mitchell* that the State seeks to devalue. Far from an isolated, gratuitous comment made in passing after the Court resolved the separation-of-powers issue, the *Mitchell* statement was part and parcel of the Court's comprehensive analysis of the question presented. "Dicta may be highly persuasive, particularly where made by the Supreme Court after that court has considered the issue and deliberately made pronouncements thereon intended for the guidance of the lower courts upon further proceedings." Cnty. *of Fresno v. Superior Court*, 146 Cal. Rptr. 880 (Cal. Ct. App. 1978). That is precisely the case here, assuming *arguendo* that *Mitchell*'s capstone statement is *dictum* rather than holding. Indeed, it is even more persuasive authority because, as we have seen, it is consistent with the general principle that it violates the separation-of-power doctrine for the Legislature to significantly interfere with the judiciary's internal operations.

4. None of the State's Other Arguments as to Why *Mitchell* Cannot Be the Law Has Any Merit

The State musters several other arguments as to why Judge Solomon's reading of *Mitchell* "cannot be an accurate statement of the law." (State Mem. at 7.) None can withstand scrutiny.

First, the State argues that "the Legislature regulates court administration and procedure all the time," citing a number of examples of legislation. (*Id.* at 7-8.) But, contrary to the State's contention, none of the examples demonstrates that "the 1972 grant of general administrative authority to the Kansas Supreme Court did not extinguish the Legislature's legislative power in the[se] area[s]." (*Id.* at 8.) In contrast to the case at bar, in none of these instances can the State point to a Supreme Court rule with which any of the cited legislation directly conflicts. Thus, all that these examples prove is that the Supreme Court acquiesced in these enactments. In other words, these examples are totally consistent with Chief Judge Solomon's reading of *Mitchell.*

Second, the State argues that Section 11 "is an exercise of 'legislative power' vested in the Legislature by Article II of the Kansas Constitution." (*Id.* at 10.) More specifically, the State invokes Article II, Section 18, which states that "[t]he legislature may provide for the election or appointment of all officers and the filling of all vacancies *not otherwise provided for in this constitution.*" (Emphasis added.) Even assuming that district court judges are considered state officers,[9] the State's reliance on Article II, Section 18 is misplaced because the process by which

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[9] *But see* K.S.A. 46-221(a): "'State officer or employee' means (1) any individual who is an elected or appointed state officer, (2) any individual who is in the classified service or unclassified service of the Kansas civil service act, (3) all officers and employees of the legislative branch and of the governor's office, irrespective of how compensated or period of employment, and (4) any individual who receives monthly or semimonthly compensation for services from the state or any state agency. *State officer or employee does not include any justice or commissioner of the supreme court or judge of the judicial branch or employee or officer of the judicial branch or any member of a board, council or commission who is appointed by the supreme court or who is elected or appointed to exercise duties pertaining to functions of the judicial branch, when such person is engaged in performing a function or duty for the judicial branch.*" (emphasis added).

district court judges are selected is "otherwise provided for" in Article III, Section 6 of the Constitution.

The State also argues that the Legislature created the position of district court chief judge in 1968, as codified in K.S.A. 20-329, and "no provision of the Constitution specifies how chief judges are to be selected." (*Id.* at 11.) But that statute was enacted four years before the Constitution was amended to vest exclusive administrative authority over the Kansas judiciary in the Supreme Court, which it exercised shortly thereafter to promulgate Rule 107. The Supreme Court's decision as to who should act as its surrogates to administer the district courts is squarely within the Court's Article III, Section 1 "general administrative authority over all the courts in this state"; it relates exclusively to a matter of internal judicial administration. The State cannot bootstrap itself on the basis of an enactment that preceded this constitutional grant of authority.[10]

Third, the State argues that "it is important to distinguish between *administrative* authority and *legislative* power to govern administration." (*Id.* at 12.) This is sophistry—there is no authority, and the State cites none, for the proposition that the Legislature is vested with the power "to govern administration" of the judiciary. Indeed, *Mitchell* holds just the opposite — that power is vested "exclusively" in the unified court system. 234 Kan. at 194, 672 P.2d at 8.

Fourth, the State argues that Section 11 "gives the Legislature no role in the actual selection of the chief judges." (State Mem. at 12.) This is true, but irrelevant. A violation of the separation-of-powers doctrine is not confined to situations where one branch of government takes over a function clearly entrusted to another branch. As the State concedes, all that is

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[10] The State also fails to mention that when enacted in 1968, K.S.A. 20-329 provided that the Supreme Court would choose the district court chief judges, then called "administrative judges." Although K.S.A. 20-329 remained on the books after the promulgation of Rule 107, there was no conflict because the enactment continued to provide that the Supreme Court would select the district court chief judges. It was not until almost 40 years later that the Legislature acted contrary to Rule 107 by seeking to wrest that authority from the Court by amending K.S.A. 20-329 via Section 11 of HB 2338.

required is for one branch to "significantly interfere" with the authority of another—and that, as we have shown, is exactly what Section 11 does.

Finally, the State argues that Section 11 "furthers proper and reasonable objectives." (*Id.* at 13.) Even if true, this is irrelevant to whether Section 11 runs afoul of the separation-of-powers doctrine. While the State argues that Section 11 "adopted peer selection of chief judges in part because of the practice in other states," including the surrounding states of Missouri, Oklahoma and Nebraska, the State concedes that "a bill that significantly interferes with the Kansas Supreme Court's administrative authority surely cannot be salvaged by a worthy motive." (*Id.)*

Nor is the State correct that Johnson and Sedgwick counties "already have a *de facto* peer selection process" because the district judges in those judicial districts "informally select a chief judge, and only their chosen candidate applies to the Supreme Court for the position." (*Id.* at 14.) That is a *de facto* nominating process, not a *de facto* selection process because the Supreme Court makes the ultimate decision and has unfettered authority to reject the "nominee" and select as chief judge the district judge the Court believes is best qualified to discharge Rule 107's administrative functions. The fact that the nominee's peers may "know [him] best and work with [him] most closely", *id.*, is of no moment because it is the Supreme Court that bears the ultimate constitutional responsibility to administer the state court system.

No more apt are the peer selection examples in the three surrounding jurisdictions cited by the State. (*Id.* at 14-15.) The State offers no evidence that the legislatures in any of those states adopted peer selection in the teeth of a Supreme Court rule that entrusted the choice to the Court itself. If the Supreme Courts of Nebraska, Oklahoma and Missouri wish to acquiesce in

legislation adopting peer selection of chief judges, that is their prerogative. But it remains the Kansas Supreme Court's prerogative to decide that matter for itself.

B. Judge Solomon's Challenge to Section 11 Is Justiciable

1. Judge Solomon Has Standing to Seek Redress for the Ongoing Injury That Began on July 1, 2014, When Section 11 Became Effective

(a) Chief Judge Solomon Satisfies the "Relaxed" Standing Requirements for a Declaratory Judgment Action

In arguing that Chief Judge Solomon lacks standing to challenge the constitutionality of Section 11, the State disregards the fact that all that he seeks is a declaratory judgment of invalidity under K.S.A. 60-1704. Kansas courts have long recognized that standing requirements are "relaxed" and "less rigorous" when a plaintiff seeks only a declaratory judgment. *See, e.g.*, *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*, 43 Kan. App. 2d at 869, 233 P.3d at 758 (standing rules are "relaxed when only a declaration of legal rights is sought"). These pronouncements are consistent with K.S.A. 60-1713, which mandates that the Declaratory Judgment Act be "liberally construed and administered to achieve" the Act's remedial purpose "to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status and other legal relations."

K.S.A. 60-1704 grants standing to seek a declaration that a statute is unconstitutional to "any person . . . whose rights, status or other legal relations are affected by [the] statute." Chief Judge Solomon easily satisfies that requirement in that Section 11 alters his "legal relations" with the Supreme Court by requiring that his reappointment as Chief Judge of the 30th Judicial District be decided not by the Court, as it has been for decades under Rule 107, but by his district court colleagues. Correspondingly, Section 11 alters his "legal relations" with his peer judges of

the 30th Judicial District because it is now their assessment of his administrative skills that will determine whether he will retain his Rule 107 responsibilities as chief judge.

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

(b) Chief Judge Solomon Also Satisfies the Traditional Test for Standing

"Under the traditional test for standing in Kansas, a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct." *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196, 1210 (2014) (internal quotation marks omitted). For an injury to be cognizable, it must be actual or imminent, concrete and particularized. *See id.* Even if the relief sought in this case went beyond a declaratory judgment, Chief Judge Solomon would satisfy the traditional standing test as well.

As discussed above, Section 11 affects Chief Judge Solomon's "legal relations" with the Supreme Court and his colleagues in the 30th Judicial District, which alone is sufficient to also meet the traditional test for standing. *Marchezak*, 607 F.2d at 42 (Gibbons, J., concurring). Additionally, it disrupts a professional relationship of trust and confidence spanning more than two decades between the Supreme Court and Chief Judge Solomon, the longest-tenured active chief judge in the Kansas district court system. This long-standing working relationship with the

Supreme Court not only distinguishes Chief Judge Solomon from every other district court judge, but also makes his injury even more personal and particularized than the injury each of the other incumbent chief judges has sustained as a result of Section 11.

Accordingly, the State is incorrect in arguing that Chief Judge Solomon is claiming only "institutional," "generalized" injury of the type that was held insufficient to support standing in *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997). In *Raines*, six individual Congressmen challenged the constitutionality of the Line Item Veto Act of 1996. The Supreme Court's holding that the Congressmen lacked standing rested in part on its conclusion that the Act affected all legislators equally and that the appellees had not been "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies." *Id.* at 821. In contrast, Chief Judge Solomon's injury is particular to his role as chief judge, distinguishing him from other district court judges in Kansas. Indeed, Chief Judge Solomon's long-standing professional relationship with the Kansas Supreme Court not only distinguishes him from other district court judges, but also from every other chief judge in the district court system. Moreover, like the plaintiffs in *Clinton v. City of New York*, 524 U.S. 417, 430, 118 S. Ct. 2091, 2099 (1998),[11] in which the line item veto was eventually found unconstitutional, Chief Judge Solomon "suffered an immediate, concrete injury" the moment that Governor Brownback signed Section 11 into law on July 1, 2014. As the Court found in *Clinton*, the appellees were injured

[11] In *Clinton*, the Supreme Court once again considered the Line Item Veto Act following the President's exercise of his authority to cancel provisions in two acts—the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997. The Supreme Court found that the plaintiffs—the City of New York, two hospital associations, one hospital, two unions representing health care employees, and a farmer's cooperative—were immediately injured by the line item vetoes. 524 U.S. at 430, 118 S. Ct. at 2099 ("The District Court correctly concluded that the State, and the appellees, 'suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel Section 4722(c) and deprived them of the benefits of that law.'").

the moment that the President used the Line Item Veto to cancel the section of the Balanced Budget Act providing health care related taxes that would benefit them.

Also without merit is the State's characterization of Chief Judge Solomon's injury as speculative. The State cites *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013), for the proposition that the alleged injury must be "certainly impending to constitute injury in fact." But even if Chief Judge Solomon's injury were deemed not to occur until January 1, 2016, when his current appointment expires and his reappointment will become dependent on a vote of the district judges of the 30th Judicial District, the injury to his personal and particularized relationship with the Supreme Court is imminent enough to support standing. That is because the law is well-settled that if the injury-causing event is certain to occur in the future—here, the vote on Chief Judge Solomon's reappointment by the judges of the 30th Judicial District—the event need not have already occurred to establish standing. *See, e.g., Sierra Club v. Moser*, 298 Kan. 22, 41-42, 310 P.3d 360, 374 (2013) (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); *Cochran v. State, Dep't of Agr., Div. of Water Res.*, 291 Kan. 898, 900, 249 P.3d 434, 438 (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).

2. The Constitutionality of Section 11 Is Ripe for Adjudication

The State is on no sounder footing in arguing that this matter is not ripe for resolution. "The doctrine of ripeness is designed to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract." *Sebelius*, 285 Kan. at 892, 179 P.3d at 380 (internal quotation marks and citations omitted). Whether Section 11's

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

In determining whether a declaratory judgment action such as this one is ripe for adjudication, the issue is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512 (1941). That is plainly the case here as evidenced by the parties' arguments for and against the constitutionality of Section 11. Nor is any further factual development necessary before this matter is ripe for adjudication. "A challenge to a statute or regulation that has not yet been applied *is generally considered fit for judicial determination if the issue raised is a purely legal one, or one which further factual development will not render more concrete.*" *Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903 (9th Cir. 1981) (internal quotation marks and citations omitted) (emphasis added). That, too, is plainly the case here as both sides agree that "the relevant facts in this matter are not in dispute" (State Mem. at 2) and, therefore, the issue before the court is "a purely legal one."

C. Judge Solomon Is Entitled to Summary Judgment

It is black letter law that "the consideration of a motion to dismiss requires accepting the factual allegations contained in a petition as true." *Duckworth v. City of Kansas City*, 243 Kan. 386, 391, 758 P.2d 201, 205 (1988). But here the State actually concedes the relevant facts in this matter are undisputed. That being the case, the constitutionality of Section 11 presents a pure question of law that this court is empowered to resolve by summary judgment under K.S.A. 2014 Supp. 60-256(c)(2). *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 and the moving party is entitled to judgment as a matter of law"); *South Central Kansas Health Ins. Grp. v. Harden & Co. Ins. Servs., Inc.*, 278 Kan. 347, 350, 97 P.3d 1031, 1033 (2004) (same).

The material facts pertinent to Chief Judge Solomon's summary judgment motion, which the State concedes are not disputed, are:

1. In 1972, the Kansas Constitution was amended to provide in Article III, Section 1, that the judicial power of the State would be vested in "one supreme court, district courts and such other courts as are provided for by law," and that the Supreme Court was vested with "general administrative authority over all courts in this state." (Kan. Const. art. III, § 1.)

2. In 1976, the Supreme Court promulgated Rule 107, which enumerates the administrative responsibilities entrusted by the Court to the chief judge of each judicial district and provides that the Supreme Court will select each chief judge in the district court system. (Kan. Sup. Ct. R. 107.)

3. Chief Judge Solomon was first appointed by the Supreme Court as chief judge of the 30th Judicial District in July, 1991 and has been reappointed bi-annually by the Supreme Court ever since. He is the longest tenured chief judge of the Kansas district court system. (Solomon Afft. ¶ 1.)

4. In serving as chief judge of the 30th Judicial District for almost a quarter of a century, Chief Judge Solomon has enjoyed a close working relationship with the Supreme Court based on trust and confidence. (Solomon Afft. ¶¶ 3, 6.)

5. In discharging his administrative responsibilities for the 30th Judicial District under Rule 107, Chief Judge Solomon deals with budget and personnel issues as well as with County Commissions, the press and the public. (Solomon Afft. ¶ 2.)

6. In addition, Chief Judge Solomon meets privately with the Supreme Court along with the other district court chief judges at least twice a year to discuss staffing, the Judicial Branch budget, and strategies for working harmoniously with the Legislature. These discussions are candid and frequently must be kept confidential. (Solomon Afft. ¶ 4).

7. Over the past few years, Chief Judge Solomon has also had special meetings with the Supreme Court regarding recurrent budget shortfalls and furloughs. On two occasions he was asked by the Supreme Court to lead the discussion among the district court chief judges, prior to the Court conferring with them. (Solomon Afft. ¶ 4.)

8. On July 1, 2014, HB 2338 became law, including Section 11 that purports to take the selection of district court chief judges away from the Supreme Court and entrust it to a vote of the district court judges in each judicial district. (HB 2338.)

9. Section 43of 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.)

Accordingly, Chief Judge Solomon not only urges the Court to deny the State's motion to dismiss, but also prays that the Court enter summary judgment (1) declaring Section 11 of HB 2338 unconstitutional as a violation of the separation-of-powers doctrine, and (2) invalidating HB 2338 in its entirety on the strength the statute's non-severability provision, which the State concedes is the correct result if Section 11 is declared unconstitutional. (State Mem. at 2.)

May 14, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned person hereby certifies that a true and correct copy of the above and foregoing document was served on counsel of record by (X) placing the same in the United States mail, postage prepaid; by (__) courier service; by (__) electronic mail to _____, by (__) facsimile, to telephone number _____, and that the transmission was reported as complete and without error, and that the facsimile machine complied with Supreme Court Rule 119(b)(3); or by (__) hand delivery, on May 14, 2015, to:

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Elizabeth R. Herbert

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

LARRY T. SOLOMON, CHIEF JUDGE, 30TH JUDICIAL DISTRICT of the STATE OF KANSAS, **Plaintiff,**	
vs.	**Case No. 2015-CV-156 Div. 6**
THE STATE OF KANSAS, **Defendant.**	

AFFIDAVIT OF LARRY T. SOLOMON

COMES now LARRY T. SOLOMON, who being duly sworn, states and alleges the following:

1. I am chief judge of the 30th Judicial District of Kansas and have held that position for over 23 years, having been reappointed bi-annually since my initial appointment on July 1, 1991. I am the longest-serving active Kansas chief judge.

2. In my position as chief judge I perform all of the functions set forth in Kan. Sup. Ct. R. 107, which was first promulgated by the Kansas Supreme Court on July 28, 1976. These duties are in addition to carrying a full caseload, approximately equal to the other six judges in the 30th Judicial District. The duties set forth in Sup. Ct. R. 107 require a chief judge appointee to have experience with budget, personnel and dealing with county commissions, the press and public, as well as common sense.

3. The relationship between the Supreme Court and the chief judge involves a significant level of communication, trust and candor that greatly exceeds the relationship that other members of the bench have with the Supreme Court.

4. Chief judges meet with the Supreme Court at least two times a year to privately discuss staffing, judicial branch budget, and most importantly, legislative agenda and other legislative issues, including strategies for working harmoniously with the legislature. These discussions are candid and, in many instances, must be kept confidential. Additionally, we have had special meetings with the Supreme Court over the past few years regarding recurrent judicial branch budget shortfalls and furloughs. On two occasions, I was asked by the Supreme Court to lead the discussion among chief judges regarding these issues, prior to the Court conferring with us.

5. On occasion, I receive requests from my departmental justice, or the chief justice, seeking information or opinions regarding certain issues.

6. Because the Supreme Court delegates to the chief judges a portion of its constitutionally granted administrative authority over the unified court system, the Court needs to have confidence in a chief judge's administrative capability, and honesty, as well as trust that he or she can keep certain matters confidential. In the past, the Supreme Court has removed chief judges who were unable to meet these expectations. Section 11 of 2014 Senate Substitute for House Bill No. 2338 severs this relationship that is so important to the effective administration of the district court system.

7. Over the past 23-plus years I have developed a significant relationship, and goodwill, with the county commissions in all five counties in the 30th Judicial District, as well as with the public and press. This is extremely important in insuring that our local operating budgets are adequately funded and that the courts in our district are seen as responsible stewards of taxpayers' funds, as well as fair, just and impartial adjudicators.

8. Additionally, I have always had a harmonious relationship with my six fellow judges and 35 staff. There have never been significant personnel or budget problems in the 30th Judicial District requiring the involvement of the Supreme Court.

FURTHER AFFIANT SAYETH NAUGHT.

Larry T. Solomon, Chief Judge

ACKNOWLEDGMENT

STATE OF KANSAS)
) ss:
COUNTY OF Kingman)

BE IT REMEMBERED that on this 6 day of May, 2015 before me, the undersigned, a notary public in and for the county and state aforesaid, came LARRY T. SOLOMON, who is known to me to be the same person who executed the foregoing instrument of writing, and such person acknowledged execution of the same before me.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal the day and year last above written.

NOTARY PUBLIC - State of Kansas
SUSAN M. HUBBELL
My Appt. Exp. 02-15-2016

Susan M. Hubbell
Notary Public

My appointment expires: 02-15-2016