IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT
DIVISION 6

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

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff, Chief Judge Larry Solomon of the 30th Judicial District, submits this reply memorandum in further support of his cross-motion for summary judgment. Pursuant to Kansas Supreme Court Rule 133, Chief Judge Solomon respectfully requests oral argument on the State's motion to dismiss and his cross-motion for summary judgment.

ARGUMENT

I. The Court Should Repudiate the State's Transparent Attempt at Judicial Intimidation

Instead of starting its reply brief with a defense of its motion to dismiss on the merits, the State informs this Court that should it rule in Chief Judge Solomon's favor and declare Section 11 of HB 2338 unconstitutional, thereby invalidating HB 2338 in its entirety, the consequence will be that the Kansas judiciary will lose its entire 2016 and 2017 budgets. That is because the Legislature inserted an unprecedented and, we submit, unconstitutional nonseverability provision into recently enacted HB 2005 that conditions the 2016 and 2017 appropriations for the Kansas judiciary on this Court ruling *against* Chief Judge Solomon's lawsuit. Should the Court rule in favor of Judge Solomon, the nonseverability provision states that "the provisions of this act are hereby declared null and void and shall have no force and effect."

One could hardly envision a more naked act of intimidation or one more threatening to the public's confidence in a fair and impartial judiciary. If the State and the Legislature were confident of their position on the merits, they would have no impetus to enact a nonseverability provision that threatens the loss of judicial appropriations unless the Court rules against Judge Solomon—"a possible temptation . . . which might lead [the Court] not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The nonseverability provision is in clear violation of the legislative principle that "[a]ny matter awaiting adjudication in a court

should not be debated or discussed in a legislative body." Nat'l Conference of State Legislatures, *Mason's Manual of Legislative Procedure*, Sec. 111(3) (2000 ed.).

Recently, Chief Justice Roberts reminded us just how critical an independent and impartial judiciary is to our tripartite system of government:

> Judges [are] charged with exercising *strict neutrality and independence* . . . . This principle dates back at least eight centuries to Magna Carta, which proclaimed, "To no one will we sell, to no one will we refuse or delay, right or justice." Cl. 40 (1215), in W. McKechnie, Magna Carta, A Commentary on the Great Charter of King John 395 (2d ed. 1914). *The same concept underlies the common law judicial oath, which binds a judge to "do right to all manner of people . . . without fear or favour, affection or ill-will,"* 10 Encyclopaedia of the Laws of England 105 (2d ed. 1908), and *the oath that each of us took to "administer justice with respect to persons, and do equal right to the poor and to the rich,"* 28 U.S.C. § 453. . . .

Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1666 (2015) (emphasis added).

Kansas's Code of Judicial Conduct echoes these same principles. The preamble begins: "An independent, fair and impartial judiciary is indispensable to our system of justice. . . . [Judges] should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity and competence." Kan. Sup. Ct. R. 601B, Code of Judicial Conduct, Preamble. To that end, Canon I mandates: "A judge shall act at all times in a manner that promotes public confidence in the *independence*, *integrity*, and *impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of Impropriety." Kan. Sup. Ct. R. 601B, Code of Judicial Conduct, Canon I.1.2 (emphasis in original).

We are confident that this Court will repudiate the Legislature's effort to improperly influence the outcome of this case and faithfully discharge its duty to decide this matter on the merits, fairly and impartially, and ignore the unwarranted intrusion by the other branches of government in the Court's decision-making process. In the event that this Court finds that Section 11 is unconstitutional, we are prepared to immediately bring suit challenging the validity

of HB 2005's nonseverability provision and seeking to preliminarily enjoin its operation so as to preserve the judicial appropriations for 2016 and 2017 pending a final adjudication.[1]

II. Contrary to the State's Contention, the Court May Consider Chief Judge Solomon's Affidavit in Resolving His Cross-Motion for Summary Judgment

In their opening brief, the State admitted that there were no disputed issues of fact relevant to the issues raised by Chief Judge Solomon's Petition and its motion to dismiss (State Mem. at 2)—a concession it repeats in its reply brief. (State Reply at 13.) As we pointed out in our opposition brief, this means that if Judge Solomon is correct on the separation-of-powers and justiciability issues, the State's motion to dismiss not only must be denied, but Judge Solomon would be entitled to summary judgment as a matter of law.

In further support of summary judgment, Chief Judge Solomon submitted a brief affidavit that simply elaborates on his Petition concerning his long-standing relationship with the Kansas Supreme Court. These facts support Chief Judge Solomon's standing to sue because they show that he has a personal, not merely an institutional, stake in the outcome of the litigation. As the State acknowledges, the factual assertions in Chief Judge Solomon's affidavit "*are personal in nature and relate to his relationship with the Supreme Court, other judges and the public generally.*" (State Reply at 18, emphasis added.)

The State, nevertheless, objects to the use of this affidavit, claiming it is entitled to discovery into Chief Judge Solomon's factual assertions, including a deposition of the Judge himself, before the Court can consider the affidavit on summary judgment. For this proposition,

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[1] We are confident there are several meritorious grounds for such a lawsuit for which we can show a substantial likelihood of success. Moreover, a preliminary injunction would be warranted because the loss of the judiciary's 2016 and 2017 appropriations threatens irreparable injury to the judicial system, all of its members, and all litigants and potential litigants the system is charged with serving. Certainly, there is no adequate remedy at law, the threat of irreparable injury far outweighs any harm a preliminary injunction might cause and the public interest in maintaining an adequately funded judiciary strongly favors provisional relief. *See Wing v. City of Edwardsville*, 51 Kan. App. 2d 58, 61, 341 P.3d 607, 611 (2014).

the State relies on K.S.A. 60-256(f), which provides that a court can continue a motion for summary judgment to permit discovery in the event the opponent "shows by affidavit or by declaration . . . that, for specified reasons, it cannot present facts essential to justify its opposition." The State, however, misapprehends the showing necessary to satisfy K.S.A. 60-256(f) by suggesting that a mere lack of discovery is sufficient to warrant a continuance of Chief Judge Solomon's summary judgment motion.

As the Kansas Supreme Court has recognized, because the State's summary judgment statute is identical to Rule 56 of the Federal Rules of Civil Procedure, the federal cases interpreting the latter are instructive in applying the former.[2] Significantly, every federal court that has addressed the showing necessary to warrant a continuance under Rule 56(f), including the 10th Circuit and the Kansas federal district courts, has held that "[a] party may not invoke Rule 56(f) by simply stating that discovery is incomplete but must instead *state with specificity how the additional material will rebut the summary judgment motion.*" *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1179 (10th Cir. 2008) (emphasis added) (citation omitted) (internal quotation marks omitted).[3] As the Second Circuit has explained, this requires the party invoking Rule 56(f) to show not only what facts they seek to develop though discovery, but also "how those facts are reasonably expected to create a genuine issue of material fact." *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (1985).

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[2] *Hartman v. Stumbo*, 195 Kan. 634, 638, 408 P.2d 693, 696 (1965) ("Our statute thereon (K.S.A. 60-256) is the same as Rule 56 of the Federal Rules of Civil Procedures (28 U.S.C.A.) and Federal cases are helpful in applying it."); *Brick v. City of Wichita*, 195 Kan. 206, 210, 403 P.2d 964, 968 (1965) ("A motion for summary judgment is relatively new to Kansas law. It was enacted as a part of the Kansas Code of Civil Procedure which became effective January 1, 1964. K.S.A. 60-256 is identical to the federal provision contained in Rule 56 (28 U.S.C.A.) of the Federal Rules of Civil Procedure. . . . Federal cases are helpful in applying the summary judgment section of the statute.").

[3] *See also Brown v. Gray*, 2011 WL 6091738, at *2 (D. Kan. Dec. 7, 2011) (same); *Semsroth v. City of Wichita*, 2008 WL 640840, at *1 (D. Kan. Mar. 6, 2008) (same).

Clearly, the State has fallen well short of making this showing. Indeed, all the State asserts is that it should be entitled to take discovery, but it nowhere identifies the facts that it expects discovery to yield or why there is reason to believe that those facts "will rebut [Chief Judge Solomon's] summary judgment motion." On the contrary, there is no reason to believe that a deposition of Chief Judge Solomon or any member of the Supreme Court would contradict the rather rudimentary factual statements in Chief Judge Solomon's affidavit. Of course Judge Solomon has his own unique personalized working relationship with the Supreme Court.

For these reasons, the State has failed to make a case for a continuance pending discovery and, accordingly, this Court can rely on the factual statements in the Chief Judge's affidavit to whatever extent it deems necessary in resolving the State's challenge to his standing to bring this action.

III. Summary Judgment Should Be Granted Declaring Section 11 of HB 2338 an Unconstitutional Violation of the Separation-of-Powers Doctrine

Although the State contends that Chief Judge Solomon is not entitled to summary judgment on his separation-of-powers claim, it offers little more in opposition than a rehash of its motion to dismiss arguments. We have fully addressed those arguments in our opposition brief and have no intention of burdening the Court by repeating our rebuttal here. Instead, we confine our reply to answering the State's new mischaracterizations of *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1 (1983).

In our opening brief, we presented a detailed analysis of why *Mitchell*'s capstone statement—that if the Legislature takes action in direct conflict with a Supreme Court rule, the latter "must prevail"—was not *dictum*, but binding precedent, and even if not binding, at least persuasive *dictum* that that this Court should follow. (Solomon Br. at 10–16.) Failing totally to

address this analysis, the State simply repeats its conclusory argument that the statement is pure *dictum.* (State Reply at 5, 7.)

Incredibly, the State now argues that even that part of *Mitchell* that it previously identified as its holding—that the Supreme Court may acquiesce in legislation that deals with judicial administration, in which case there is no separation-of-powers violation—"is questionable on its merits." (State Reply at 6.) According to the State, "[i]f an act of the Legislature significantly interferes with the Supreme Court's administrative authority, surely the Court's acquiescence should not make the usurping legislation constitutional." *Id.*

Again, the State misconstrues *Mitchell.* Because the Supreme Court's Article III, Section 1 administrative authority is delegable, in contrast to its traditional power to hear and decide cases, *Mitchell* holds that the Court can choose to permit the Legislature to act in its stead, rather than adopting its own rule. 234 Kan. at 195, 672 P.2d at 9. By definition, then, the legislation would not conflict with the Supreme Court's exercise of authority, and would not constitute a significant interference with the Court's Article III, Section 1 authority. There is only a significant interference with the Supreme Court's administrative authority when there is a direct conflict between a Supreme Court administrative rule and legislation addressing the same matter of court administration. And that is precisely the case with Section 11 of HB 2338. *Id.*

The State also argues that our interpretation of *Mitchell* proves too much because it would mean that any conflicting legislation would be deemed unconstitutional "no matter how trivial or nonexistent the interference." (State Reply at 7.) This is a red herring. It is simply not realistic that a constitutional challenge to legislation would be commenced based on a "trivial or non-existent" interference with the Supreme Court's administrative authority. Regardless, that is certainly not this case.

Finally, the State argues that, in contrast to the Supreme Court's constitutional authority to hear and decide cases, the Court's administrative authority under Article III, Section 1 is not an aspect of "judicial power" that is vested exclusively in the Court. (State Reply at 7–8.) But that argument is flatly contradicted by *Mitchell*, where the Supreme Court makes clear that "judicial power" includes the Court's Article III, Section 1 authority "to promulgate and enforce reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice." 234 Kan. at 194, 672 P.2d at 8. That this constitutional grant of administrative authority is vested exclusively in the Supreme Court is explicit in *Mitchell*'s declaration that even when the Court acquiesces in legislation dealing with judicial administration, "[t]he constitutional power over court administration and procedure *remains vested in the judicial branch.*" *Id.* at 195, 672 P.2d at 9 (emphasis added).

In sum, no amount of distortion can change the fact that *Mitchell* controls the disposition of this case. Accordingly, Chief Judge Solomon is entitled to summary judgment declaring Section 11 of HB 2338 a significant interference with the Supreme Court's constitutional authority to administer the unified Kansas judiciary and, as such, a clear violation of the separation-of-powers doctrine. To repeat the Supreme Court's pronouncement in *State v. Greenlee*, 228 Kan. 712, 719, 620 P. 2d 1132, 1138 (1980), "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.*" (Emphasis added.)

IV. This Case Presents a Justiciable Controversy Appropriate for Summary Judgment

In its zeal to insulate Section 11 from constitutional challenge, the State takes the extreme position that neither Chief Judge Solomon nor any other member of the Kansas judiciary has standing to bring such a challenge except perhaps the Supreme Court itself. (State Reply at 3,

"At most, any change in the selection process is an injury to the Supreme Court.".) Under the legal Catch-22 proffered by the State, either the Supreme Court would have to bring suit, which would pose potential conflicts with respect to its ability to rule on this matter, or no court could ever rule on the matter for want of a justiciable controversy. One can readily understand why the State would favor such an outcome, but fortunately the law does not support it.

While the Supreme Court remains responsible for overseeing the chief judges' administrative responsibilities, Section 11 strips the Court of its power to select and remove district court chief judges, including Chief Judge Solomon. Instead, his fellow district court judges of the 30th Judicial District, for whom the Chief Judge Solomon currently determines case assignments, budgeting, administrative support, *etc.*, hold the power of appointment.[4] Prior to the enactment of Section 11, the Supreme Court's evaluation of a chief judge's performance informed its decision of whether to retain a chief judge. (*See* Solomon Aff. ¶ 6, stating that the Supreme Court has removed chief judges who were unable to meet the Court's expectations.) It is indisputable, therefore, that taking away the Supreme Court's power to retain chief judges has an effect on a district chiefs' relationships with the Court, and with their fellow district judges. Under Section 11, the Supreme Court's evaluation of how a chief district judge is performing is no longer relevant to his or her continued exercise of the Supreme Court's delegated duties.

Chief Judge Solomon's particular relationship with the Supreme Court illustrates the impact of Section 11. Over nearly a quarter of a century, Chief Judge Solomon has been reappointed bi-annually by the Supreme Court to be chief judge of the 30th Judicial District. As

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[4] These chief judge responsibilities are a delegation of the Supreme Court's "general administrative" authority, requiring the Supreme Court to supervise chief judge activities. *See* Kan. Sup. Ct. R. 107 (designating chief judge responsibilities, including case assignments under the Supreme Court's supervision, preparation and submission of district court county operating budgets, and evaluation of the court's effectiveness in administering justice and recommendation of changes).

the longest serving active chief in the Kansas district court system, his performance of his administrative duties under Kansas Supreme Court Rule 107, including dealing with budget and personnel issues, County Commissions, the press and the public, has clearly earned him the trust and confidence of the Supreme Court. (*See* Solomon Aff. ¶ 2.) Under Section 11, that trust and confidence is now irrelevant to his continued tenure as chief judge—which gives Chief Judge Solomon a personal stake in the outcome of this case. The State is thus dead wrong in asserting that Chief Judge Solomon's "current relationship with the Supreme Court has not been affected in any way." (State Reply at 3.)

At the same time, Section 11 puts Judge Solomon in the position of having to justify his continued service as chief judge to the other judges of the 30th Judicial District, who do not share the perspective and experience that the Supreme Court possesses as the constitutionally mandated guardian of the administration of Kansas's unified judiciary. In fact, Judge Solomon will be in the same position as an employee, who, in a change of workplace procedure, finds he will be evaluated for retention by a human resources manager who, although superficially familiar with the employee's work, is not the supervisor he reported to, worked closely with, and was evaluated by. Simply put, Judge Solomon's fellow district court judges are at a distinct disadvantage in assessing his administrative qualifications to continue as chief judge. In this respect, Section 11 further threatens Chief Judge Solomon with personalized, not institutional, injury that supports his standing to challenge the provision's constitutionality.

Accordingly, the State's continued reliance on *Raines v. Byrd*, 521 U.S. 811 (1997), is plainly misplaced. (State Reply at 4.) Chief Judge Solomon's injury is not "institutional" or "general" as it was for the Congressmen challenging the Line Item Act. In *Raines*, the Act created an institutional injury that affected all legislators equally. In contrast, Section 11

threatens Chief Judge Solomon with particular and personalized injury that is unique to his long-standing relationship with the Supreme Court. Nor, contrary to the State's contention (State Reply at 4–5), is Chief Judge Solomon advancing a novel theory of standing derived from *Marchezak v. McKinley*, 607 F.2d. 37, 42 (3d Cir. 1979). *Marchezak* is simply an illustration of traditional standing analysis in a case in which a change in relationship threatens a plaintiff with personalized injury.

Although conceding that "the Kansas Supreme Court has described the standing inquiry as 'less rigorous' in declaratory judgment cases" (State Reply at 2), the State nevertheless argues that a "changed relationship" does not suffice because "a party must establish a *personal* interest in a court's decision and that he or she *personally* suffers some actual or threatened injury as a result of the challenged conduct." (State Reply at 3, citing *Sierra Club v. Moser*, 298 Kan. 22, 33, 310 P.3d 360, 369 (2013) (emphasis added).) Yet that is precisely what Chief Judge Solomon has established here—that Section 11 has caused a change in his relationship with the Supreme Court and his fellow district court judges that threatens him with *personalized* injury and gives him a *personal* interest in the outcome of the case. If there were any doubt in this regard, it should be resolved in favor of Chief Judge Solomon's standing in accordance with the "relaxed" requirements in declaratory judgment actions.

Finally, the State's continued mischaracterization of Chief Judge Solomon's injury leads to its erroneous contention that the constitutionality of Section 11 is not ripe for adjudication. Chief Judge Solomon was threatened with injury to his long-standing relationship with the Supreme Court as soon as Section 11 became law on July 1, 2014, and thus its validity is ripe to be decided now. Indeed, even if the Court were to determine that Chief Judge Solomon's injury does not occur until January 1, 2016, when his reappointment as Chief Judge is officially out of

the Supreme Court's hands, the dispute over Section 11's constitutionality is sufficiently concrete to be ripe for adjudication at this time. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 892, 179 P.3d 366, 380 (2008).

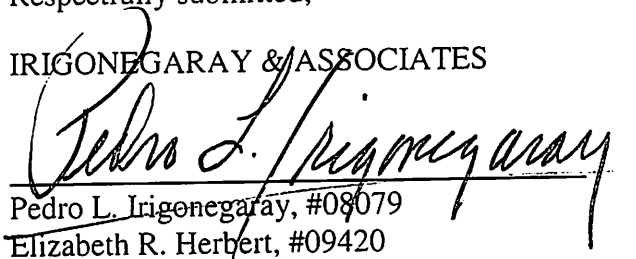
CONCLUSION

For all the foregoing reasons, as well as those set forth in Chief Judge Solomon's opening brief, the Court should enter summary judgment declaring that this is a justiciable controversy and that Section 11 of HB 2338 constitutes an unconstitutional violation of the separation-of-powers doctrine.

July 8, 2015

Respectfully submitted,

IRIGONEGARAY & ASSOCIATES



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