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No. 114,573

IN THE SUPREME COURT OF THE STATE OF KANSAS

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

Plaintiff-Appellee,

v.

STATE OF KANSAS,

Defendant-Appellant.

RESPONSE BRIEF OF APPELLANT

**Appeal from the District Court of Shawnee County,
Honorable Larry Hendricks, District Judge
District Court Case No. 2015-cv-156**

Stephen R. McAllister, KS Sup. Ct. No. 15845
Solicitor General of Kansas
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597
Telephone: (785) 296-2215
Fax: (785) 291-3767
E-mail: steve.mcallister@trqlaw.com

Oral Argument: 20 Minutes

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ARGUMENT

Chief Judge Solomon's Opening Brief fails to demonstrate that this matter presents a justiciable case or controversy. Chief Judge Solomon lacks standing because the injuries he alleges at this time are not concrete and particularized. He will suffer a legally cognizable injury only if peer selection causes him to lose his position as chief judge, but that injury is speculative and may never occur. This matter is not ripe for much the same reason.

Chief Judge Solomon also has not demonstrated that Section 11 of 2014 Senate Substitute for House Bill 2338 ("HB 2338") exceeds the Legislature's authority under Article II and Article XV, § 1, of the Kansas Constitution or unconstitutionally infringes on the Supreme Court's general administrative authority under Article III, § 1. The statement in *State v. Mitchell*, 234 Kan. 185, 195, 672 P.2d 1 (1983), that a court rule "must prevail" over a conflicting statute is not only dicta, but is wrong as a matter of law. Not one of the factors from this Court's traditional four-factor separation of powers test favors Chief Judge Solomon. At the very least, he has not demonstrated that HB 2338, § 11, "clearly" violates the Kansas Constitution, as he must for the statute to be struck down.

I. This Matter Does Not Present a Justiciable Case or Controversy.

As the party invoking the courts' jurisdiction, Chief Judge Solomon has the burden of establishing that this matter presents a justiciable case or controversy. *See Gannon v. State*, 298 Kan. 1107, 1119, 1123, 319 P.3d 1196 (2014). He has failed to carry this burden.

A. Chief Judge Solomon's Novel "Changed Relationship" Theory Is Insufficient to Provide Standing.

The District Court held that Chief Judge Solomon had standing because he had a constitutionally protected "right" or "entitle[ment]" to the former chief judge selection procedure that was altered by HB 2338. Vol. II at 128-29. Chief Judge Solomon briefly but unpersuasively attempts to defend this theory of standing. As the State pointed out in its Opening Brief, this argument fails (if for no other reason) because the former selection procedure was not designed to protect chief judges from being improperly dismissed. *See* State's Opening Brief at 7-8. The former chief judge selection process was nothing like a form of insurance, tenure, or even due process termination procedure.

As an alternative to the District Court's analysis, Chief Judge Solomon relies primarily on a novel "changed relationship" theory of standing. He argues that because HB 2338, § 11, provides that chief judges will be selected by their fellow district court judges rather than the Supreme Court, the law affects his "legal relations" with the Supreme Court[1] as well as with his colleagues in the 30th Judicial District and that this changed relationship confers standing. *See, e.g.*, Solomon Opening Brief at 5-6, 23-24.

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[1] Several times in his brief, Chief Judge Solomon alleges that he enjoys a close relationship with the Supreme Court based on "trust and confidence," an allegation supported only by an untested affidavit he submitted in support of his Cross-Motion for Summary Judgment. Solomon Opening Brief at 4-6; *see also id.* at 24. A similar untested assertion was made, presumably on behalf of this Court, to the Legislature during its deliberations related to a bill that eventually became part of HB 2338. *See* Testimony of Steve Grieb, General Counsel to the Chief Justice, in Opposition to SB 365 at 1 (attached as Exhibit A to the State's Motion for Recusal) (stating that "the current system" helps "assure a good working relationship among the Supreme Court, the departmental justice, and the chief judge"). The District Court did not find it necessary to rely on these allegations, *see* Vol. II at 130, although Chief Judge Solomon continues to do so. If this Court deems the allegations to be material—either with respect to justiciability or on the merits—the District Court's grant of summary judgment should be reversed for the procedural reason that the State has not had *any* opportunity to conduct discovery

The only authority Chief Judge Solomon can cite for this novel theory of standing is a concurring opinion from a 1979 Third Circuit case. *See Marchezak v. McKinley*, 607 F.2d 37, 42 (3d Cir. 1979) (Gibbons, J., concurring). In that case, milk producers challenged an agency order that altered payment requirements for milk handlers. *Id.* at 38. The majority opinion held that the plaintiffs lacked standing because they had not presented any evidence of an injury in fact. *Id.* at 40-41. But the concurring opinion disagreed, arguing that "a change in the terms upon which these producers do business with their customers, the handlers, suffices to confer standing," even though the producers had not shown any economic harm. *Id.* at 42 (Gibbons, J., concurring). Any persuasive value of *Marchezak* lies in the majority opinion, which buttresses the State's position that Chief Judge Solomon lacks standing. *See id.* at 41.

Notably, even the concurring opinion in *Marchezak* fails to support Chief Judge Solomon's standing argument. To date, HB 2338, § 11, has not changed the terms on which he does business with the Supreme Court or his fellow district court judges; so long as he remains chief judge, his professional interactions with the Supreme Court and his fellow judges are unaffected. Chief Judge Solomon has not been deprived personally of any legal right, and he certainly has not suffered any *actual* harm, as the majority opinion in *Marchezak* required. *See id.* at 41; *see also Brady Campaign to Prevent Gun Violence v. Brownback*, No. 14-CV-2327-JAR, 2015 WL 3572049, at *5 (D. Kan. 2015). ("For an asserted injury to be imminent, it must be real and immediate—not remote,

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regarding these matters. *See N. Natural Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013) (summary judgment should not be granted until the nonmoving party has had an adequate opportunity to conduct discovery); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (under analogous federal law, summary judgment is appropriate only "after adequate time for discovery").

speculative, conjectural, or hypothetical." (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013))). Chief Judge Solomon must show that "enforcement of the statute inflicts an actual or imminently-threatened injury." *Brady Campaign*, 2015 WL 3572049, at *1.

If a mere "changed relationship" sufficed to confer standing, then the plaintiff members of Congress would have had standing in *Raines v. Byrd*, 521 U.S. 811 (1997). The line item veto law, which gave additional power to the President at the expense of Congress, diminished the plaintiffs' power as legislators and thereby affected their relationship with the Executive Branch. But the Supreme Court held that the members of Congress alleged only a "wholly abstract" injury and therefore lacked standing. *Id.* at 829. The same is true here. A simple change in an institutional, official-capacity "relationship" is not, in itself, a concrete and particularized injury. Otherwise, all sorts of government officials would have standing to challenge laws, regulations, and official actions with which they may disagree.

Alternatively, Chief Judge Solomon claims he is not required to show a concrete and particularized injury because the Kansas Declaratory Judgment Act, K.S.A. 60-1701, *et seq.*, grants him standing to sue. Not so. "[A]ctual cases and controversies are still required." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897, 179 P.3d 366 (2008). Indeed, Chief Judge Solomon's argument overlooks the fact that the case or controversy requirement is constitutional in nature, rooted in the separation of powers and the meaning of the "judicial power." *See id.* at 898; *Gannon*, 298 Kan. at 1119 ("[O]ur case-or-controversy requirement stems from the separation of powers doctrine embodied in the Kansas constitutional framework."). Statutes may impose *additional* restraints on a

plaintiff's ability to bring certain actions, but no statute can confer standing on a plaintiff who has not suffered a constitutionally cognizable injury. *See, e.g.*, *Sierra Club v. Moser*, 298 Kan. 22, 29-30, 310 P.3d 360 (2013) (plaintiffs must establish "traditional standing" even if they can show "statutory standing"). The terms of the Declaratory Judgment Act are irrelevant to whether Chief Judge Solomon has constitutional standing.

Finally, Chief Judge Solomon argues that he has standing because, as the District Court noted, there is "'uncertainty' and 'insecurity' with respect to the process governing selection and retention of chief judges across the state." Solomon Opening Brief at 22 (quoting Vol. II at 128). But "uncertainty" about the law has never been a sufficient basis to confer standing. If it were, litigants would have standing to seek advisory opinions. In *Morrison*, for instance, there was uncertainty about the legality of the Kansas Funeral Privacy Act—that was the entire reason for the law's "judicial trigger." *Id.* at 878-79. Yet this Court held that a lawsuit filed pursuant to the judicial trigger "would seek an advisory opinion" and therefore would not present an actual case or controversy. *Id.* at 912. To have standing, Chief Judge Solomon must demonstrate not just "uncertainty" about the law, but a concrete and particularized injury *in fact*.

He has failed to do so. The judges in the 30th Judicial District may choose to retain Chief Judge Solomon as chief judge, especially given his length of service in that position, in which case he will never suffer any actual harm. In fact, HB 2338 could actually benefit Chief Judge Solomon by removing any risk that this Court might decline to reappoint him. Only the Justices of this Court know the likelihood of Chief Judge Solomon's continued services as chief judge under the system that existed before

HB 2338, and no facts related to that likelihood are in evidence in this case.[2] Thus, Chief Judge Solomon has failed to demonstrate that the likelihood of his continued service as chief judge is greater under Rule 107 than under HB 2338. He has not suffered a constitutionally cognizable injury in fact.

B. This Matter Is Not Ripe Because There Is No Harm to Chief Judge Solomon at This Time, and He May Never Suffer Such Harm.

Chief Judge Solomon's arguments regarding ripeness fail for much the same reason. Chief Judge Solomon will suffer a legally cognizable injury only if HB 2338 causes him to lose his position as chief judge, but that injury is only hypothetical at this time because Chief Judge Solomon's fellow district court judges may well select him to continue as chief judge. *See Shipe v. Pub. Wholesale Water Supply Dist. No. 25*, 289 Kan. 160, 170, 210 P.3d 105 (2009) ("To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract.").

Chief Judge Solomon argues that this matter is ripe for decision because no further factual development is necessary. But the constitutionally determinative fact—whether Chief Judge Solomon will suffer any injury as a result of HB 2338—remains hypothetical and speculative. Because that *potential* injury may never occur, this matter is not ripe for judicial review at this time. *See Texas v. United States*, 523 U.S. 296, 300 (1998).

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[2] Again, if the allegations regarding Chief Judge Solomon's relationship with this Court, or with his fellow district court judges, or both, are pertinent to the ultimate decision in this case, including to Chief Judge Solomon's burden to establish that the courts have subject matter jurisdiction, the State requires an opportunity for discovery which, among other efforts, likely would include depositions of those with knowledge of these relationships. Further, and in any event, Chief Judge Solomon's repeated assertion of a "close relationship" with this Court is in itself a ground for recusal of at least the Chief Justice and perhaps other members of the Court. *See* State's Recusal Motion at 6-7, 13-14.

II. HB 2338, § 11, Is a Valid Exercise of the Legislature's Constitutional Authority that Does Not Unconstitutionally Infringe on the Kansas Supreme Court's General Administrative Authority.

Chief Judge Solomon fares no better on the merits. He has not met his burden to prove the statute, which is presumed to be constitutional, is not. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84, 179 P.3d 366 (2008) ("[T]he separation of powers doctrine requires a court to presume a statute to be constitutional."). His first argument is that HB 2338, § 11, is a "clear" violation of general separation of powers principles, and that there "could hardly be a more significant encroachment on this Court's administrative prerogatives." *See* Solomon Opening Brief at 9. This argument essentially mirrors one presented, presumably on behalf of this Court, to the Legislature during deliberations on HB 2338. *See* Testimony of Steve Grieb, General Counsel to the Chief Justice, in Opposition to SB 365 at 2 ("Grieb Testimony") (attached as Exhibit A to the State's Motion for Recusal) ("The appointment of chief judges is *clearly* within the administrative authority of the Supreme Court." (emphasis added)). Citing only decisions that do not involve the operation of the courts and only for general principles, Chief Judge Solomon offers only an unsupported conclusory opinion that any action that affects the selection of chief judges is a per se, automatic, "clear encroachment" upon the separation of powers. *Id.* at 10. But this mere assertion of his desired conclusion is not an argument.

Aside from his unsupported say-so, Chief Judge Solomon makes two primary arguments that actually attempt to support his desired conclusion. The first is his assertion that *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1 (1983), held that when a Kansas statute conflicts with a Supreme Court rule, the Court's rule "must prevail." That

statement in *Mitchell*, however, is dicta, and in any event wrong. Chief Judge Solomon's second main argument is that HB 2338, § 11 fails the four-factor separation of powers test articulated in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 179 P.3d 366 (2008). But he fails to demonstrate—under that test—that HB 2338, § 11, *substantially interferes* with the Supreme Court's general administrative authority, much less that the law "clearly" does so as is required to declare the statute unconstitutional. *See State ex rel. Schneider v. Bennett*, 219 Kan. 285, 289, 547 P.2d 786 (1976).

A. The Insupportable Statement in *State v. Mitchell* that a Supreme Court Rule "Must Prevail" over a Conflicting Statute Is Both Dicta and Wrong.

1. The statement in Mitchell *is dicta.*

In *Mitchell*, this Court upheld a jury selection statute in the absence of a conflicting Supreme Court rule. The Court's "*ratio decidendi*"—to use Chief Judge Solomon's terminology—was that when there is no conflict between court rules and legislation governing judicial administration, the Supreme Court has *acquiesced* in the legislation and the legislation therefore does not violate the separation of powers. *Mitchell*, 234 Kan. at 195. The Court's additional discussion of what might happen in the event of a conflict between court rules and legislation does not necessarily follow from this premise and was completely irrelevant to the case before the Court. Thus, the statement regarding how a conflict between a court rule and a statute should be resolved was quintessential dicta and has no precedential value. *See* State's Opening Brief at 12-13.

2. *On the merits, the statement in* Mitchell *is wrong and does not correctly state Kansas constitutional law.*

Moreover, when evaluated on its merits, the statement in *Mitchell* about judicial acquiescence is highly questionable, to put it politely. If an act of the Legislature significantly and impermissibly interferes with the Supreme Court's general administrative authority, that law violates the separation of powers, and the Court's acquiescence cannot render such an unconstitutional law constitutional. It is a fundamental principle of federal constitutional law that separate branches of government and separate sovereigns cannot agree to accept constitutional violations by other branches or sovereigns in order to legitimize such transgressions. For example, the U.S. Supreme Court has made clear that no branch of the federal government may validly consent to a violation of the Constitution by another branch. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (holding that the line item veto violated the separation of powers even though Congress had passed the Line Item Veto Act); *id.* at 452 (Kennedy, J., concurring) ("That a congressional cessation of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow."). Nor can the States consent to Congress exceeding its Article I powers and intruding into constitutionally protected state sovereignty. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 181-83 (1992) (discussing the federal separation of powers and emphasizing that "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution"). There is no reason why—and no indication in any of this Court's decisions why—those same principles would not hold true under the Kansas Constitution.

To be clear, the State does not argue that acquiescence is irrelevant to the separation of powers analysis. In the context of historical practice (or at least the *longstanding practice* of the branches), acquiescence may help give meaning to ambiguous constitutional provisions. *See The Pocket Veto Case*, 279 U.S. 655, 690 (1929) ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department, . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" (quoting *State v. South Norwalk*, 77 Conn. 257, 264, 58 A. 759, 761 (1904))). Acquiescence also may indicate—though not inevitably or necessarily—that a particular law does not substantially interfere with the operations of another branch. The point here, however, is that the *Mitchell* dicta purports to make acquiescence (or the lack thereof) the *sine qua non*, or, put more colorfully "the *ne plus ultra*, the Napoleon Brandy, the Mahatma Ghandi, the Cellophane," *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring), of determining whether there is a separation of powers violation. That has never been the law—in any jurisdiction of which the State is aware—and plainly counsels in favor of recognizing that statement in *Mitchell* as inaccurate dicta, not a binding constitutional command.

In criticizing the State's position on acquiescence, the District Court focused on "an intrusion into [the] sphere of [one branch's] power by another branch." Vol. II at 152; *see also id.* at 153 ("'[A]quiescence' to a minor *intrusion* by another branch is an essential prerequisite for the consideration of 'the practical result of the blending of powers as shown by actual experience over a period of time.'" (emphasis added)). The District Court's choice of the word "intrusion," however, is not actually helpful, given

that there are many unclear lines between the branches of government. As this Court has recognized, "Separation of powers of government has never existed in pure form except in political theory. In reality, there is an overlap and blending of functions, resulting in complementary activity by the different branches that makes absolute separation of powers impossible." *Morrison*, 285 Kan. at 883.

This case presents a classic example of overlapping authority. The Kansas Constitution gives the Supreme Court "general administrative authority" over the court system. Kan. Const. art. III, § 1. But at the same time it gives the Legislature plenary "legislative" power over all matters within the police powers of the State—a power which includes passing general laws governing and affecting the judicial system—as well as specific "legislative" power to provide for the selection of "officers," a term that necessarily includes judges. *See* Kan. Const. art. II, §§ 1, 18; Kan. Const. art. XV, § 1. Thus, it is not sufficient simply to say that an action by one branch is an "intrusion" into the sphere of another branch and is therefore unconstitutional absent acquiescence, as the District Court here appeared to assume. Instead, the proper and well-settled inquiry is to apply the four-factor analysis this Court has recognized, which the State addresses in the next section of its brief.

Even if acquiescence by the Supreme Court were considered sufficient to *save* an otherwise unconstitutional law, the opposite proposition—that the Supreme Court can invalidate any statute by adopting a conflicting court rule—does not follow. Indeed, such a power would give the Supreme Court an effective "veto" over any legislation remotely connected to the judicial branch, *i.e.*, the Supreme Court could invalidate any statute so long as the Court could come up with a valid court rule that conflicted with the targeted

statute. The Court then could revive the invalidated statute (even without any intervening legislative action) merely by toggling on and off the conflicting court rule. *See* State's Opening Brief at 14-15. That is not the law in any jurisdiction of which the State is aware, nor should it be in Kansas. Ultimately, the conclusion is inescapable that *Mitchell* was wrong to suggest that whenever the Court has not acquiesced to a law governing the Judicial Branch, a separation of powers violation has occurred. If the passing dicta from *Mitchell* applies here, then it must be overruled.

3. The "judicial power" the Kansas Constitution grants to the Supreme Court does not include the power to appoint chief judges.

In his attempt to defend *Mitchell*'s incorrect dicta, Chief Judge Solomon argues that authority to govern court administration and procedure is part of the "judicial power" vested "exclusively" in the courts under Article III, § 1, of the Kansas Constitution. Solomon Opening Brief at 11. But, contrary to Chief Judge Solomon's claim, "Kansas courts have repeatedly recognized that the 'judicial power' is the 'power to hear, consider and determine controversies between rival litigants.'" *Morrison*, 285 Kan. at 896 (quoting *State ex rel. Brewster v. Mohler*, 98 Kan. 465, 471, 158 P. 408 (1916)); *see also VanSickle v. Shanahan*, 212 Kan. 426, 440 (1973) ("[T]he judicial power is the power to interpret and apply the laws in actual controversies."). The exclusive "judicial power" is not an administrative power, and it has nothing to do with the Court's general administrative authority.

The exclusive "judicial power" in Article III long predated the 1972 constitutional amendment that gave the Supreme Court "general administrative authority over all courts in this state" in *addition* to the Court's pre-existing "judicial power." Indeed, if the "judicial power" necessarily included "administrative authority," then there was no

reason for the 1972 amendment. Notably, the 1972 amendment does not vest "general administrative authority" in the Supreme Court "exclusively." *See* Kan. Const. art. III, § 1. This is in sharp contrast to the Article III provision granting the Judiciary "exclusive" "judicial power."[3] Taken together, the reasonable interpretation of the two provisions is that authority over court administration and procedure is not constitutionally vested *exclusively* in the Judicial Branch. Interpreting Article III, § 1, otherwise would leave the Legislature with *no authority* to regulate judicial administration and procedure, even though it has done so in *numerous* instances since Kansas became a state, including many times after the 1972 amendment. Even critics of changing the process for selecting chief judges who have implied particular legislative action regulating courts may be unconstitutional have nevertheless acknowledged that the Legislature has a role to play in court administration. *See, e.g.*, Chief Justice Lawton Nuss, Written Testimony in Opposition to 2014 Senate Bill 364 at 3 ("C.J. Nuss Testimony") (attached as Exhibit B to State's Motion for Recusal) (acknowledging that the *Legislature* authorized the Supreme Court to create a single budget for the entire judicial branch, citing K.S.A. 20-158); *id.* at 4 ("[I]f there is absolutely no question about the constitutionality of SB 364, then at a minimum why not have a thorough study of this proposed change . . . ?").

Indeed, since statehood it has been understood that the legislative power includes the power to allocate administrative authority among the courts. In the first legislative session the Legislature passed "AN ACT to organize and define the jurisdiction of the

[3] It also is in sharp contract with the Constitution's express provisions that the Legislature provide for election or appointment of "[*a*]*ll* officers whose election or appointment is not otherwise provided for," Kan. Const. art. XV, § 1 (emphasis added), and that the "legislature may provide for the election or appointment of *all* officers and the filling of *all* vacancies not otherwise provided for in this constitution," Kan. Const. art. II, § 18 (emphasis added).

Supreme Court." L. 1861, Ch. 66. That law gave the Supreme Court the "power to prescribe rules of practice and change the same, and provide for their publication." L. 1861, Ch. 66, § 2. In that same session, the Legislature separately passed "AN ACT relating to the organization of Courts of Justice and their powers and duties." L. 1861, Ch. 68. That second act gave district courts "full power to classify and distribute business therein, as may be necessary; to make rules and regulations for practice therein, until otherwise provided by law." L. 1861, Ch. 68, § 2.

Thus, to the extent that the concept of "acquiescence," properly understood, has any bearing in this case, it operates to make clear that any ambiguity in the constitutional language at issue here should be resolved in favor of legislative authority to establish procedures and rules for the district courts, as the Legislature has done, with the judiciary's acquiescence, since the first year of statehood. *See supra* Part II.A.2. This is precisely what the Legislature did in passing HB 2338; it allocated authority to select chief district judges to the district court judges rather than the Supreme Court and established a procedure by which the districts courts are to do so.

Chief Judge Solomon claims that the Legislature may govern judicial administration—to the extent the exercise of legislative authority does not conflict with court rules—because the Supreme Court has *delegated* this power to the Legislature. But that argument makes no more sense than his acquiescence argument: If the Kansas Constitution did vest in the Judicial Branch exclusive authority over court administration and procedure, the Supreme Court could not change this constitutional arrangement by delegating some of that authority to the Legislature. *Morrison*, 285 Kan. at 916-17 (concluding that the Legislature may not delegate its lawmaking power to Supreme Court

through a "judicial trigger"). And, of course, this supposed delegation has not been made explicitly or formally in any kind of court rule or case decision or order; rather, it apparently has been accomplished simply by the Supreme Court's *silence*.

The much more logical view is that authority to govern Judicial Branch administration—like the authority to govern Executive Branch administration—is in significant respects a necessary component of the "legislative power" that Article II of the Kansas Constitution vests in the Legislature, which is precisely why the Legislature had the power to regulate judicial administration before 1972, and can continue to do so today.

B. This Court's Standard, Four-Factor Separation of Powers Test Demonstrates that HB 2338, § 11, Is a Valid Exercise of the Legislature's Constitutional Authority that Does Not Substantially Interfere with the Court's General Administrative Authority.

Although Chief Judge Solomon relies primarily on the incorrect *Mitchell* dicta, he also argues that HB 2338, § 11, is unconstitutional under the four-factor separation of powers test this Court articulated in *Morrison*. But Chief Judge Solomon has not demonstrated that *any* of these factors favors the invalidation of HB 2338, § 11, much less most or all of them.

1. The essential nature of the power being exercised—providing for the selection of chief judges—is a legislative function.

Chief Judge Solomon does not attempt to rebut the State's primary argument that providing for the selection of officers is a legislative power under Article II, § 18, and Article XV, § 1, of the Kansas Constitution. His silence on this point is like that of other public critics of HB 2338 who have focused *exclusively* on the alleged effect the change will have on the Court's general administrative authority rather than on the text of *all*

relevant constitutional provisions, including the more specific, longer standing provisions that explicitly grant legislative authority to provide for the appointing of officers such as chief judges. *See generally, e.g.*, Grieb Testimony; C.J. Nuss Testimony; Lawton R. Nuss, *Kansas Legislature Threatens Judges' Independence*, Kansas City Star, March 17, 2014, available at http://www.kansascity.com/opinion/readers-opinion/as-i-see-it/article342570/Kansas-Legislature-threatens-judges%E2%80%99-independence.html; Press Release, Kansas Supreme Court, Supreme Court Issues Statement on Senate Substitute for House Bill 2338 (Apr. 18, 2014), available at http://www.kscourts.org/Kansas-courts/General-information/News-Releases-2014.asp (attached as Exhibit D to the State's Motion for Recusal).

In the District Court, Chief Judge Solomon argued that judges are not "officers" because they do not fall under the State Governmental Ethics Law's definition of "state officer or employee." *See* Vol. I at 65 n.9, K.S.A. 46-211(a). But the fact that the Legislature chose to exclude judges from an ethics statute does not mean that judges are not "officers" for purposes of the Kansas Constitution. *Cf. NFIB v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (although the "penalty" label attached to the healthcare law's individual mandate "is fatal to the application of the Tax Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's [constitutional] taxing power"). In fact, in the Kansas Constitution, Article IV (Elections) and numerous provisions in Article III (Judiciary) demonstrate that judges are "officers" for constitutional purposes. *See, e.g.*, Kan. Const. art. IV, § 3 ("All elected public officials in the state, except judicial *officers*, shall be subject to recall . . . ." (emphasis added)); Kan. Const. art. III, § 12 ("All judicial *officers* shall hold their *offices* until their

successors shall have qualified." (emphasis added)); Kan. Const. art. III, § 13 (judicial salaries "shall not be diminished during their terms of *office*, unless by general law applicable to all salaried officers of the state. Such justices or judges shall receive no fees or perquisites nor hold *any other office* of profit or trust under the authority of the state, or the United States except as may be provided by law, or practice law during their continuance in *office*." (emphasis added)).

The District Court agreed that judges are officers under Article II, § 18, but held that the position of chief judge is not a separate office from that of any other district court judge. Chief Judge Solomon does not attempt to defend this assertion in his Opening Brief, and for good reason. The Constitution is clear that the position of Chief Justice of the Supreme Court is a separate office from that of the other Justices, *see* Kan. Const. art. III, § 2, and there is no reason the position of chief district judge is any different. Like the Chief Justice, chief district judges have duties above and beyond those of other district court judges. *See* K.S.A. 20-329; Kansas Supreme Court Rule 107. Chief district judges also receive, by legislative action, additional compensation for performing these duties. *See* K.S.A. 75-3120g.

If the position of chief judge were merely an administrative designation, as the District Court found, then a chief judge who resigned or was not selected to remain as chief judge during the underlying term of office as district court judge would have his or her salary reduced in violation of Article III, § 12, of the Kansas Constitution. In fact, the salary of a chief judge who leaves that position, but remains a district court judge, can be reduced to the normal district court judge salary because the additional compensation under K.S.A. 75-3120g is tied to the person's "term[] of office" as chief judge under

Article III, § 12, just as the additional compensation for the Chief Justice of the Supreme Court is tied to the office of Chief Justice.

Because chief judges are "officers" for purposes of the Constitution, and because no other provision of the Constitution specifies how chief judges are to be selected, the Legislature has authority to provide for their selection. In fact, this point is so important that it is included *twice* in the Constitution, first in Article II, § 18 ("The legislature may provide for the election or appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution."), and again in Article XV, § 1 ("All officers whose election or appointment is not otherwise provided for, shall be chosen or appointed as may be prescribed by law."). As this Court explained in *Leek v. Theis*, 217 Kan. 784, 539 P.2d 304 (1975), "the general power of appointment to public office under the Kansas Constitution is not an exclusive function of the executive, and the exercise of the power of appointment is not inherently an executive function. Within constitutional limits the legislature, as representative of the people, can vest the power in its discretion." *Id.* at 802; *see also Clark v. State ex rel. Mississippi State Medical Ass'n*, 381 So. 2d 1046, 1049-50 (Miss. 1980) (noting that the Legislature's specific constitutional power for "filling all vacancies, in all offices" prevails over the Governor's general executive power). Although *Leek* addressed Executive Branch appointments, the same logic applies to the Judicial Branch.

Throughout his Opening Brief, Chief Judge Solomon argues that chief judges are "surrogates" of the Supreme Court in carrying out their administrative duties. *See, e.g.*, Solomon Opening Brief at 3, 14, 16, 18, 20. This argument is similar to one advanced by other critics of HB 2338. *See, e.g.*, Grieb Testimony at 2 (describing district court judges

as "employee[]" with potentially "divided loyalties"). This view improperly diminishes the role of judicial officers serving in the district courts and ignores the fact that the Supreme Court's administrative authority is "general" in nature. Kan. Const. art. III, § 1. Several of the sources cited in Chief Judge Solomon's Opening Brief confirm this: The report of the Citizens' Committee on Constitutional Revision indicated that the constitutional amendment would vest "*overall* administrative authority in the supreme court," while the Judicial Study Advisory Committee observed that the constitutional amendment "vested *ultimate* administrative authority over Kansas courts in the supreme court." Solomon Opening Brief at 2 (quoting Wesley H. Sowers, et al., *Report of the Citizens Committee on Constitutional Revision* (Feb. 1969) and Edward F. Arn, et al., *Recommendations for Improving the Kansas Judicial System*, 13 Washburn L. J. 271, 363-64 (1964) (emphasis added)); *see also* C.J. Nuss Written Testimony at 3.

This "overall" or "ultimate" administrative authority (neither of which is the less-potent term "general" that ultimately was included in the Constitution) is similar to the Governor's "supreme," art. I, § 1, executive power. At most, Article III, § 1, of the Kansas Constitution grants the Supreme Court overall administrative control of the courts, just as Article I, § 1, grants the Governor supreme executive control of the Executive Branch. If anything, many Executive Branch officials (for example, cabinet secretaries) are more obviously "surrogates" of the Governor than chief judges are "surrogates" of the Supreme Court. But just as the Legislature may (and routinely does) enact valid laws governing the selection, qualifications, duties, and actions of the Governor's "surrogates" who administer various matters within the Executive Branch, so it may with the chief judges that Chief Judge Solomon proposes are "surrogates" of the

Supreme Court. It is undisputed that the Legislature may enact statutes governing all manner of administrative functions in the Executive Branch, including the full spectrum of departments, agencies, boards and commissions, *see* State's Opening Brief at 19, just as it may in the Judicial Branch, *see* State's Opening Brief at 10. Thus, Chief Judge Solomon's labeling of chief judges as "surrogates" does nothing to demonstrate that the Legislature lacks authority to pass laws—in the exercise of its "legislative power"—governing Executive or Judicial Branch administration.

The State agrees that the Supreme Court must be "able to ensure that the chief judges . . . are properly performing their administrative duties." *See* Solomon Opening Brief at 20. But HB 2338, § 11, preserves that ability. Chief judges remain "subject to supervision" by the Supreme Court, and they must exercise their duties and powers (which include, among other things, clerical functions, judge assignment, and fiscal duties) in compliance with Supreme Court rules. *See* K.S.A. 20-329. If chief judges fail to perform their administrative duties properly, the Supreme Court may discipline, suspend, or remove them for cause under Article III, § 15, of the Kansas Constitution. Contrary to Chief Judge Solomon's claim, a "for cause" restriction on the Supreme Court's removal authority does not interfere with the Supreme Court's general administrative authority any more than "for cause" removal restrictions interfere with the President's "general administrative control" over the federal Executive Branch. *See* State's Opening Brief at 21-22.

2. *HB 2338, § 11, does not grant the Legislature any degree of control over the judicial branch because the Legislature has no role in selecting chief judges.*

Chief Judge Solomon argues that the Legislature has "exert[ed] itself over the Judiciary" by providing for the peer selection of chief judges. Solomon Opening Brief at 18. But peer selection does not allow the Legislature to "control" the Judiciary any more than did the statute's former method of selection by the Supreme Court. Rather, HB 2338, § 11, simply modified who *within the Judicial Branch* chooses chief judges. While it is true that in HB 2338 the Legislature specified how chief judges are to be selected, it also did that when it first *created* the chief judge position in 1968. *See* L. 1968, ch. 385, § 34 (codified at K.S.A. 20-329). Supreme Court Rule 107, which post-dates K.S.A. 20-329, merely reflects the selection method formerly specified by the Legislature. Under Chief Judge Solomon's conclusory reasoning, *any* statute related to the selection of chief judges—including K.S.A. 20-329 as it existed prior to HB 2338—would be an unconstitutional action by the Legislature to "exert itself over the Judiciary." HB 2338 is a valid exercise of the Article II legislative power that did not increase the Legislature's control over the Judiciary.

3. *The Legislature was motivated by a proper purpose—increasing local control over the "office" of chief judge—and Chief Judge Solomon has presented no evidence that the Legislature passed HB 2338, § 11, in an effort to undermine the Supreme Court.*

Chief Judge Solomon baldly asserts that the Legislature passed HB 2338 with the "specific objective of disempowering this Court." Solomon Opening Brief at 19. But he has presented no evidence to support this claim. On the contrary, as the State noted in its Opening Brief, the legislative history of HB 2338 demonstrates that the Legislature was motivated by reasonable and proper objectives in passing HB 2338, § 11, specifically

(1) the widespread practice of peer selection in other states; (2) the existence of peer selection in the Legislature, city and county commissions, and school boards; (3) the preferences of several district court judges who testified in favor of the proposal; and (4) a preference for increasing local control.

Chief Judge Solomon argues that the Legislature threatened to defund the courts by passing 2015 House Bill 2005 ("HB 2005") and that this somehow demonstrates the Legislature acted improperly in passing HB 2338. But the Legislature's objectives in passing HB 2005 are irrelevant here.[4] HB 2005 is not at issue in this case. HB 2005's nonseverability clause has been enjoined in a separate lawsuit filed by the Attorney General, and the Legislature's objectives in passing HB 2005 do not demonstrate that the Legislature passed HB 2338 *a year earlier* in some kind of malicious attempt to undermine the Supreme Court's authority. The only evidence in the record indicates that the Legislature acted reasonably in adopting peer selection.[5]

Moreover, with the exception of a change in section (a) regarding the methodology of *Judicial Branch* selection that will be necessitated by the passage of HB 2338, Supreme Court Rule 107 will remain unchanged with respect to the Supreme

[4] Although irrelevant here, Chief Judge Solomon's characterization of the legislative objectives behind HB 2005 is questionable. Key legislators and the Governor have indicated that they did *not* intend HB 2005 to eliminate funding for the Judicial Branch. *See* Exhibit A to State's Motion for Temporary Injunction and Stay, *State ex rel. Schmidt v. Shipman*, 2015-CV-13 (Neosho Cnty. Dist. Ct., Sept. 22, 2015).

[5] Notably, it was Chief Judge Solomon, not the State, who argued that the nonseverability provision in HB 2338 was enforceable and that it must operate to invalidate all provisions of that bill, including the funding provisions. *See* Vol. I at 6 (claiming that "in the event that Section 11 of H.B. 2338 is adjudged unconstitutional . . ., the entire enactment is, and should be declared, invalid because, by virtue of Section 43, it 'shall be presumed conclusively that the legislature would not have enacted the remainder of such act without' Section 11."). Only later, after the subsequent enactment of HB 2005, did Chief Judge Solomon adopt the position that linking funding to the validity of the change in the chief judge selection process was impermissible.

Court's management and control over chief district judges in the exercise of their duties and powers. HB 2338 is hardly the hallmark of an impermissible assertion of legislative power.

4. Practical experience demonstrates that HB 2338, § 11, will not substantially interfere with the Kansas Supreme Court's general administrative authority.

Finally, Chief Judge Solomon offers no evidence based on practical experience in support of his argument that HB 2338, § 11, unconstitutionally interferes with the Supreme Court. Nor could he. The available evidence from Kansas, surrounding states, and at the federal level all demonstrates that peer selection will *not* significantly interfere with the Supreme Court's general administrative authority. Instead of discussing the practical result "as shown by *actual* experience," *Morrison*, 285 Kan. at 875 (emphasis added), Chief Judge Solomon offers only his own speculation about what he believes the results of HB 2338, § 11, will be. *See* Solomon Opening Brief at 14. This speculation is similar to that presented to the Legislature by an opponent of HB 2338. *See* Grieb Testimony at 2 (stating that changing the chief judge selection process "is almost certainly guaranteed to take time away from employees'"—that is, duly appointed district court judges'—"work duties and could result in divided loyalties"). Chief Judge Solomon's speculation, however, is contradicted by actual practice.

In the District Court, Chief Judge Solomon attempted to rebut the fact that peer selection is the *de facto* process in Johnson and Sedgwick counties by pointing out that the Supreme Court could, in theory, decline to appoint a judge selected by that judge's peers and instead select another person as chief judge. But there is no indication that this has ever happened in practice, and certainly not on a regular basis. In actual practice, peer

selection has been the policy in those two counties—the largest in Kansas—and Chief Judge Solomon has not presented *any* evidence that this policy has ever interfered with this Court's general administrative authority.

Like the District Court, Chief Judge Solomon also dismissed practical experience from surrounding states, speculating that the supreme courts of those states may have acquiesced in peer selection, while peer selection in Kansas conflicts with Supreme Court Rule 107. Vol. I at 67. This argument necessarily relies on *Mitchell*'s incorrect statement of the law, and in any event it misses the point. Even assuming (the unlikely proposition) that peer selection of chief judges in surrounding states is permissible only because those states' supreme courts have acquiesced, their uniform acquiescence would in fact be a strong and compelling indication that peer selection does not significantly interfere with their general administrative authority. There is no basis for concluding that peer selection will have a radically different effect in Kansas, and Chief Judge Solomon has offered nothing but speculation to show that it would.

CONCLUSION

The District Court should have dismissed this matter for lack of jurisdiction because there is no justiciable case or controversy. Even in declaratory judgment actions, the plaintiff is required to show an injury in fact, and Chief Judge Solomon has not done so. This matter also is not ripe for decision.

If this Court reaches the merits, the judgment of the District Court should be reversed because HB 2338, § 11, does not significantly interfere with this Court's general administrative authority under this Court's separation of powers analysis: (1) determining how the office of chief judge is filled is a legislative power under Articles II and XV of

the Kansas Constitution, (2) HB 2338 gives the Legislature no role in the actual selection of chief judges, and (3) peer selection is a reasonable policy decision consistent with widespread practice among the states.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

By: /s/ Dwight Carswell
Jeffrey A. Chanay, KS Sup. Ct. No. 12056
Chief Deputy Attorney General
Stephen R. McAllister, KS Sup. Ct. No. 15845
Solicitor General of Kansas
Dwight R. Carswell, KS Sup. Ct. No. 25111
Assistant Solicitor General
Memorial Building, 2nd Floor
120 SW 10th Ave.
Topeka, KS 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
Email: jeff.chanay@ag.ks.gov
steve.mcallister@trqlaw.com
dwight.carswell@ag.ks.gov

Attorneys for the State of Kansas

CERTIFICATE OF SERVICE

I certify that on the 4th day of December 2015, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and copies were electronically mailed to:

Pedro L. Irigonegaray
Elizabeth R. Herbert
1535 SW 29th St.
Topeka, KS 66611
pli@plilaw.com
erh@plilaw.com

Matthew Menendez
Brennan Center for Justice
161 Ave. of the Americas, 12th Floor
New York, NY 10013
matt.menendez@nyu.edu

Attorneys for Plaintiff

Steven C. Day
Woodard, Hernandez, Roth & Day
245 N. Waco, Ste. 260
Wichita, KS 67201-0127
scday@woodard-law.com

Amy Lemley
Foulston Siefkin LLP
1551 N. Waterfront Parkway, Ste. 100
Wichita, KS 67206-4466
alemley@foulston.com

Attorneys for Amicus Curiae
Kansas State Committee of the
American College of Trial Lawyers

Stephen Douglas Bonney
ACLU Foundation of Kansas
3601 Main Street
Kansas City, MO 64111
dbonney@aclukswmo.org

Karen Michelle Donnelly
Copilevitz & Canter, LLC
310 W. 20th Street, Suite 300
Kansas City, MO 64108
kdonnelly@cckc-law.com

Micheline Z. Burger
697 Crawford Circle
Longmont, CO 80504
mzburger08@gmail.com

Attorneys for Amicus Curiae
ACLU Foundation

/s/ Dwight Carswell
Dwight R. Carswell
Assistant Solicitor General