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
Appellee,

v.

STATE OF KANSAS
Appellant.

RESPONSE BRIEF OF APPELLEE

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

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TABLE OF CONTENTS

The Honorable Chief Judge Larry T. Solomon ("Chief Judge Solomon") submits this response brief in further support of his opening brief seeking to affirm the ruling of the district court of Shawnee County, Kansas, which held that this matter is justiciable, that Section 11 of 2014 House Bill 2338, Chapter 82 of the 2014 Session Laws of Kansas ("HB 2338") is unconstitutional as a violation of the separation-of-powers doctrine, and that because Section 11 is unconstitutional, the entire statute is consequently invalidated by virtue of HB 2338's non-severability provision, Section 43. For the reasons articulated in Chief Judge Solomon's opening brief as well as in this brief, this Court should affirm the district court's ruling.

I. Chief Judge Solomon Has Standing to Seek a Declaratory Judgment and His Claim Is Ripe for Adjudication

A. Chief Judge Solomon Satisfies the "Relaxed" Standing Requirements for a Declaratory Judgment Action, Which the State Ignores

Although the State concedes that the requirements for standing in declaratory judgment actions are "less rigorous," it frames its analysis solely in terms of traditional standing, and wholly ignores the Kansas Declaratory Judgment Act. As the district court recognized, this Act states that it "is remedial in nature and its purpose is to settle and provide relief from uncertainty and insecurity with respect to disputed rights, status and other legal relations *and should be liberally construed and administered to achieve that purpose*." K.S.A. 60-1713 (emphasis added); *see* Memorandum Decision at 11. (R. II, 128.)

Thus, Kansas courts have long recognized that standing requirements are "relaxed" and "less rigorous" when a plaintiff seeks only a declaratory judgment. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897, 179 P.3d 366, 382-83 (2008) ("As in federal court, less rigorous requirements have been imposed in declaratory judgment

cases; yet, actual cases and controversies are still required."); *Hartman v. City of Mission*, 43 Kan. App. 2d 867, 869, 233 P.3d 755, 758 (2010) (standing rules are "relaxed when only a declaration of legal rights is sought"). Specifically, K.S.A. 60-1704 of the Declaratory Judgment Act 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." K.S.A. 60-1704.

Chief Judge Solomon easily satisfies this relaxed standard. Section 11 alters his legal relations with both this Court and his fellow district court judges by requiring that his reappointment as Chief Judge of the 30th Judicial District be decided, not by this Court—as it has been for decades under Supreme Court Rule 107 ("Rule 107")—but by his district court colleagues instead. It is indisputable that taking away this Court's power to appoint and retain district court chief judges such as Chief Judge Solomon—who currently acts as its delegate in determining such matters as case assignments, budgeting, and administrative support under Rule 107—has affected his relationships with this Court and with his fellow district court judges.

Chief Judge Solomon has been reappointed bi-annually by this Court to be Chief Judge of the 30th Judicial District for nearly a quarter of a century. As the longest serving active chief judge in the Kansas district court system, his performance of his administrative duties under Rule 107 has obviously earned him the trust and confidence of this Court. Thus, under Section 11, Chief Judge Solomon's legal relationships have been affected in a highly personalized way that clearly supports his standing to challenge the provision's constitutionality.

Moreover, as the district court found, because Section 11 directly conflicts with Rule 107 and its constitutionality is the subject of this litigation, "[i]n the present situation, there is undoubtedly 'uncertainty' and 'insecurity' with respect to the process governing selection and retention of chief judges across the state." Memorandum Decision at 11. (R. II, 128.) Consequently, "under the current state of affairs, chief judges across the state cannot truly be certain whether their performance *as* chief judges will be gauged by the Kansas Supreme Court or by their colleagues." *Id.* (emphasis in original). The district court therefore concluded that "[i]nsofar as the Plaintiff is entitled to a determination as to who will review his performance as Chief Judge and, if said review is favorable, who will retain him in that position, the Plaintiff has shown standing to challenge the constitutionality of § 11." *Id.* at 12. (R. II, 129.)[1]

B. Chief Judge Solomon Also Satisfies the Traditional Test for Standing

Chief Judge Solomon's particular and personalized injury also easily satisfies the traditional test for standing. The State argues that Chief Judge Solomon's injury is only "institutional" and "generalized," similar to the claims in *Raines v. Byrd*, 521 U.S. 811 (1997), where the United States Supreme Court found that six individual members of

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[1] In concluding that Chief Judge Solomon has standing to challenge Section 11, the district court did not consider Chief Judge Solomon's affidavit and properly rejected the State's claim that additional discovery of that affidavit was needed in this case. Id. at 13. (R. II, 130.) The State, in its opening brief on appeal to this Court, has not challenged the district court's conclusion that "[n]o additional discovery is deemed necessary in order to evaluate Plaintiff's standing." Id. Additionally, the district court did not rely on Chief Judge Solomon's affidavit in reaching the conclusion that Section 11 is unconstitutional as a violation of the separation-of-powers doctrine. As the State concedes in its opening brief, the district court decided this issue "as a matter of law, based on undisputed facts." State Opening Brief at 10. Thus, no further discovery is needed to determine the justiciability of this matter and the constitutionality of Section 11.

Congress lacked standing to challenge the constitutionality of the Line Item Veto Act of 1996. State Opening Brief at 5-6. However, *Raines* is completely inapposite. In *Raines*, the Court's holding rested on the fact that the members did not allege any individual injury, but rather alleged an institutional injury—the diminution of legislative power affecting all of Congress—that was "wholly abstract and widely dispersed." *Raines*, 521 U.S. at 821, 829. In contrast, Section 11 permanently alters Chief Judge Solomon's particular relationship with both this Court and his fellow district court judges. This inherently personal injury is not at all comparable to the "wholly abstract and widely dispersed" institutional injury that the Congress members in *Raines* alleged to have suffered.

Notably, in *Clinton v. City of New York*, 524 U.S. 417 (1998), one year after *Raines* was decided, the Supreme Court once again considered the Line Item Veto Act after the President exercised his authority to cancel a provision in the Balanced Budget 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 when the President used the line item veto. *Id.* at 430 ("The District Court correctly concluded that the State, and the [plaintiffs], '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.'"). Like the plaintiffs in *Clinton*, Chief Judge Solomon "suffered an immediate, concrete injury" the moment that HB 2338 became effective on July 1, 2014. Section 11 has disrupted Chief Judge Solomon's particular relationship with this Court, as this Court's evaluation of Chief Judge Solomon will no longer determine whether he is

reappointed as chief judge of the 30th Judicial District. Similarly, Chief Judge Solomon's relationship with his peer judges on the district court has changed because they are now responsible for determining whether he will keep his job as chief judge.

The State further cites *Clapper v. Amnesty International USA,* 133 S. Ct. 1138, 1147 (2013) for the proposition that an alleged injury must be "certainly impending" to constitute injury in fact, and wrongly characterizes Chief Judge Solomon's injury as speculative. State Opening Brief at 6. Chief Judge Solomon has already been injured due to his changed relationships with this Court and with his fellow district court judges. Yet even if Chief Judge Solomon's injury were deemed not to occur until January 1, 2016—a mere 22 days after oral argument in this case—when his current appointment expires and his reappointment will depend on a vote of the district judges of the 30th Judicial District, the injury to his personal and particularized relationship with this Court is clearly imminent. 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 a city's permit to appropriate water, which could imminently injure the value of their property).

C. The Constitutionality of Section 11 Is Ripe for Adjudication

There is nothing "hypothetical" about Chief Judge Solomon's injury in this case. It occurred, and his entitlement to a declaratory judgment matured, on July 1, 2014, when Section 11 became law, thereby altering his long-standing relationships with this Court and his fellow district court judges of the 30th Judicial District. As the district court correctly found, "the immediate 'harm' stemming from § 11 is the loss of the right to a certain process governing the selection and retention of chief judges." Memorandum Decision at 13. (R. II, 130.) Additionally, "[t]o the extent that the Plaintiff's right to that selection and retention process has been altered by § 11 and, thus, harmed by it, the harm occurred as of the date § 11 became effective as law." *Id.*

What Chief Judge Solomon is seeking in this case is not an "advisory opinion." His legal relationships have already been affected in a highly personalized and concrete manner by Section 11, and the constitutionality of that provision is therefore ripe to be decided now. Even if the Court were to find that Chief Judge Solomon's injury does not occur until his reappointment goes to a vote on January 1, 2016, this dispute is not abstract, hypothetical, or premature. The State asserts that only one type of injury—the loss of Chief Judge Solomon's position as chief judge—is sufficient for the dispute to be ripe. There is simply no foundation for this argument—a party need not lose his job before challenging the governing law.

II. Section 11 Directly Conflicts with Supreme Court Rule 107 and Is Unconstitutional Pursuant to *State v. Mitchell*

This Court has at least two distinct bases for determining that Section 11 is unconstitutional as a violation of the separation-of-powers doctrine—(1) that Section 11 is unconstitutional under *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1 (1983), and (2) that

Section 11 is unconstitutional when evaluated pursuant to the four factors described by this Court in *Sebelius*.

A. State v. Mitchell

In Chief Judge Solomon's opening brief, we provided 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, that even if it were *dictum*, it is at least persuasive *dictum* that this Court should follow. *See* Chief Judge Solomon Opening Brief at 10-14.

Mitchell holds that when a Supreme Court rule and a statute conflict, "the court's constitutional mandate must prevail." *Mitchell*, 234 Kan. at 195, 672 P.2d at 9. In *Mitchell*, the Court considered whether a statute passed by the Legislature that governed jury selection violated the separation-of-powers doctrine. *Id.* at 193, 672 P.2d at 8. The Court framed the question by stating that "[a]t issue is whether the Supreme Court has exclusive constitutional power to make rules pertaining to court administration and procedure." *Id.*

As a preliminary matter, this Court concluded that pursuant to Article III, Section 1 of the Kansas Constitution, "the judicial power of Kansas is vested *exclusively* in the unified court system." *Id.* at 194, 672 P.2d at 8 (emphasis in original). Moreover, this Court determined that pursuant to its "general administrative authority over the court system," 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.* at 194, 672 P.2d at 8-9. This Court observed, however, that it can choose to share its administrative authority over the unified court system with the Legislature "without violating the

separation of powers doctrine" either (1) by cooperating with the Legislature "through the use of agreed-upon legislation" or (2) by "acquiesce[ing] in legislative action" in court administration. *Id.* at 195, 672 P.2d at 9. In either event, this 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). Separation of powers "[p]roblems arise only when court rules and a statute conflict. Under such circumstances, *the court's constitutional mandate must prevail.*" *Id.* (emphasis added).

In *Mitchell*, there was no conflicting Supreme Court rule governing jury selection. *Id.* As such, the Court concluded that the jury selection statute did not violate the separation-of-powers doctrine because there was no Supreme Court rule that conflicted with that statute. *Id.* at 195, 672 P.2d at 9.

Thus, *Mitchell* instructs that this Court can choose to permit the Legislature to act in its stead, rather than adopting its own Supreme Court rule, because this Court's Article III, Section 1 administrative authority is delegable, in contrast to its traditional power to hear and decide cases. *Id.* By definition, such legislation would not conflict with this Court's exercise of authority, and would not constitute a significant interference with this Court's Article III, Section 1 authority. There is only a significant interference with this Court's administrative authority when there is a direct conflict between a Supreme Court rule and legislation addressing the same matter of court administration. That is precisely the case with Section 11, which directly conflicts with Rule 107 since it strips this Court's power to appoint chief district court judges.

1. 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*: "[t]he former carr[ies] greater authority than what are commonly referred to as mere *dict[um]*; the latter are mere *dict[um]*."

> 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.*[2]

Significantly, Kansas courts recognize that certain *dicta* are compelling enough to be treated as "persuasive authority" that should be followed. *See, e.g., 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).

The State, however, likens *Mitchell*'s capstone statement—that where court rules and a statute conflict, "the court's constitutional mandate must prevail"—to *dictum* that is unnecessary to the decision of the case, citing to *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 281 Kan. 844, 862, 137 P.3d 486, 497 (2006). State Opening Brief at 12. In that case, the Supreme Court considered the Court of Appeals' passing comment about the "inappropriate" statutory bases invoked for an attorney's fee award to be *dictum*, and

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

noted that the Court of Appeals "did not analyze . . . or provide support for its conclusion." *Id.*, 281 Kan. at 861, 137 P.3d 486 at 497. Indeed, the Court of Appeals had made it unmistakably clear that this comment was gratuitous "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. *Ramsey v. Lee Builders, Inc.*, 32 Kan. App. 2d 1147, 1158, 95 P.3d 1033, 1041 (2004).

However, this Court's statement in *Mitchell* was far from an isolated, gratuitous comment made in passing. To the contrary, the *Mitchell* statement was part and parcel of this 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 court upon further proceedings." *County of Fresno v. Superior Court*, 146 Cal. Rptr. 880, 882 (Cal. Ct. App. 1978).[3]

2. The State's Other Arguments for Disregarding *Mitchell* Similarly Have No Merit

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[3] Further, the State argues that because there was no conflict between a statute and a Supreme Court rule in *Mitchell*, "a categorical assertion of what would happen in such a situation was unnecessary to the decision." State Opening Brief at 12. However, the factual disposition of *Mitchell* does not render this 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 first argues that "the Legislature relies on its legislative power to regulate court administration and procedure all the time," citing a number of examples of legislation. State Opening Brief at 10-11. However, none of the examples of legislation cited by the State involved a Supreme Court rule with which the cited legislation directly conflicted. Thus, all of the cited examples are merely instances where this Court acquiesced in the legislative enactments, which is wholly consistent with *Mitchell*'s teaching that this Court "can acquiesce in legislative action" related to court administration and procedure. *Mitchell*, 234 Kan. at 195, 672 P.2d at 9.

The State also asserts that the District Court's reading of *Mitchell* "would mean that the Supreme Court could extinguish any legislative enactment governing judicial administration or procedure merely by adopting a conflicting rule that 'must prevail' over the statute," thus purportedly giving this Court a "veto" over certain legislation. State Opening Brief at 14. However, there is nothing remarkable about the proposition that when this Court first 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 chief district court judges—it is a violation of the separation-of-powers doctrine for the Legislature to then pass a statute in direct conflict with the rule.

While the State argues that this "proposition [is] found nowhere in the text or structure of the Constitution," *id.*, this Court explained in *Mitchell* that 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 "veto" an existing Supreme Court rule that was validly promulgated pursuant to this 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.

To support its "veto" argument, the State conjures up a "parade of horribles" in which this Court flip flops, alternately invalidating and then re-validating a statute by promulgating a conflicting rule after the legislation is enacted, and then later revoking the rule. State Opening Brief at 14. However, this is clearly not the case here and it is difficult to believe that such an unlikely scenario would ever actually arise.

Finally, the State argues that, in contrast to this Court's constitutional authority to hear and decide cases, this Court's administrative authority under Article III, Section 1 is not an aspect of "judicial power" that is vested exclusively in this Court. *Id.* Yet that argument is flatly contradicted by *Mitchell*, where this Court made clear that "judicial power" includes this Court's Article III, Section I authority "to promulgate and enforce reasonable rules regulating judicial administration and court procedure as necessary for the administration of justice." *Mitchell*, 234 Kan. at 194, 672 P.2d at 8. That this constitutional grant of administrative authority is vested exclusively in this Court is explicit in *Mitchell*'s declaration that even when this 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.

III. Section 11 Is Also Unconstitutional When Evaluated under the Four Factors Described by This Court in *Sebelius*

As the district court held, Section 11 is also unconstitutional when evaluated pursuant to the four factors described by this Court in *Sebelius*. Memorandum Decision at 35. (R. II, 152.) The four factors that this Court uses to evaluate "whether there has been a significant interference by one branch of government" are: "(a) the essential nature of the power being exercised; (b) the degree of control by one [branch] over another; (c) the objective sought to be attained . . . ; and (d) the practical result of the blending of powers as shown by actual experience over a period of time." *Sebelius*, 285 Kan. at 884, 179 P.3d at 375. Each of these four factors support the conclusion that Section 11 violates the separation of powers.

A. The Essential Nature of the Power Being Exercised Is Fundamentally One of Court Administration

The State argues that Section 11 "is an exercise of 'legislative power' vested in the Legislature by Article II of the Kansas Constitution." State Opening Brief at 16. 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.) However, here the process by which district court judges are selected is "otherwise provided for" in Article III, Section 6 of the Kansas Constitution, which governs the district courts.

The State further contends that the Legislature created the position of chief district court judge in 1968, as codified in K.S.A. 20-329, and that "no provision of the Constitution specifies how chief judges are to be selected." State Opening Brief at 16-17. The State surprisingly fails to mention that when it was enacted in 1968, K.S.A. 20-329 provided that the Supreme Court would choose the chief district court judges, then called

"administrative judges." *See* Kan. Laws 1968, ch. 385, § 34. Moreover, the Kansas Constitution was amended in 1972—after the passage of K.S.A. 20-329—to vest exclusive administrative authority over the Kansas court system in this Court, which this Court exercised shortly thereafter to promulgate Rule 107. This Court's decision as to who should act as its delegates to administer the district courts is thus squarely within its Article III, Section 1 "general administrative authority over all the courts in this state" and relates exclusively to a matter of internal judicial administration. 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 this Court would select the chief district court judges. It was not until almost 40 years later that the Legislature acted contrary to Rule 107 by seeking to wrest that authority from this Court via Section 11 of HB 2338.

Additionally, the State asserts that "[t]here is a fundamental and constitutionally critical distinction between *administrative* authority and *legislative* power to govern administration," which it contends "is within the Legislature's purview." State Opening Brief at 20 (emphasis in original). The State cites no authority for the proposition that the Legislature is vested with the power "to govern administration" of the judiciary and none in fact exists. 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. This is made clear in the text of Article III, Section 1, which was amended in 1972 to provide that, "[t]he judicial power of this state shall be vested exclusively in one court of justice. . . . The supreme court shall have general administrative authority over all the courts in this state." Kan. Const. art. III, § 1.

The amendment to Article III, Section 1 grew out of a report issued in 1969 by the Citizens' Committee on Constitutional Revision, established by the Legislature. *See* Wesley H. Sowers, et al., *Report of the Citizens' Committee on Constitutional Revision* (Feb. 1969). That report, in recommending to amend Article III, Section 1 to include an explicit grant of authority to this Court to administer the entire Kansas judicial court system, revealed the purposes behind amending Article III, Section 1:

> The committee believes that the transcendent requirement of the judiciary is to provide justice with the least possible delay, and that the main areas of reform to accomplish this ultimate goal, not necessarily in the order named, are those designed to attain: (1) proper supervision, administration and discipline of judicial personnel; (2) qualified judges free of political pressures and considerations; (3) such flexibility as will insure efficient use of available judges; (4) steadfast recognition of and insistence upon vigilant maintenance of the doctrine of separation of powers with the three branches of government free from encroachments of each other; (5) adequate tenure and compensation to attract and hold qualified judges on the bench; and (6) public confidence in the judicial system.
>
> *With the foregoing objectives in mind, section 1 of the proposed Article would create a unified court with overall administrative authority in the supreme court branch thereof and would vest the supreme court with rule making power regarding process, practice, and procedure at all levels of the unified court, as well as regarding appeals. Such rule making power is, in reality, an inherent power of the judiciary.*

Id. at 43 (emphasis added); *see Behrmann v. Pub. Emp. Relations Bd.*, 225 Kan. 435, 441, 591 P.2d 173, 178 (1979).

The State also erroneously contends that chief judges "are not surrogates or agents" of this Court. State Opening Brief at 20-21. However, as the district court determined, "the position of chief district court judge is one of the principal instruments through which the Kansas Supreme Court's constitutionally-granted 'general administrative authority' over the courts in Kansas is wielded." Memorandum Decision at 26. (R. II, 143.)

The State's further argument—that Section 11 preserves this Court's general administrative authority because chief judges remain "subject to supervision" by this Court, which still "retains the authority to discipline, suspend, or remove chief judges for cause" under Article III, Section 15 of the Kansas Constitution—completely misses the point. State Opening Brief at 21. Because Section 11 strips this Court of its ability to select its delegates in discharging its constitutional mandate to administer the State's unified court system, Section 11 nullifies a fundamental tenet of a principal-agent relationship—the ability of the principal to choose his or her agent.

Therefore, as the district court found, the nature of the power being exercised through Section 11 is fundamentally one of court administration, as the delegation of administrative authority to chief judges is inherent in this Court's general administrative authority under Article III, Section 1. *See* Chief Judge Solomon Opening Brief at 15-18; Memorandum Decision at 22-30. (R. II, 139-47.) As the district court determined:

> [T]he selection of a chief district judge is inherent in the supreme court's 'general administrative authority,' as chief district court judges are expected to wield a portion of the administrative authority of the Kansas Supreme Court. The Court further concludes that the selection of a chief district court judge, therefore, is more closely connected to the supreme court's general administrative authority than to the Legislature's power to appoint state officers. A judge who bears the responsibility of wielding the supreme court's administrative powers must, ultimately, be accountable *to* the supreme court. To hold such a judge accountable to other parties—even if they are his or her peers on the district court—would improperly hamstring the supreme court's 'general administrative authority.'

Memorandum Decision at 30. (R. II, 147.)

B. The Degree of Control by the Legislature Over This Court Is Significant

The State argues that Section 11 "does not grant the Legislature any role in selecting chief judges." State Opening Brief at 22. But by providing for a new method

of selecting chief judges, the Legislature has usurped this Court's power to make the selection itself. As the State concedes, all that is required to violate the separation-of-powers doctrine is for one branch to "significantly interfere" with the authority of another—and that is exactly what Section 11 does.

Indeed, as the district court determined, the Legislature has unconstitutionally exercised significant control over the judiciary through Section 11 by nullifying this Court's ability to select its delegates—chief district court judges—in discharging its Article III, Section 1 mandate to administer the State's unified court system. The district court correctly stated that, "[i]n stripping the Kansas Supreme Court of the power to choose a chief district court judge, the Legislature—while not directly wielding the power to choose itself—is, in fact, exerting itself over the Judiciary: it has chosen *who chooses* chief district court judges." Memorandum Decision at 31 (emphasis in original). (R. II, 148. Further, "[w]ithout the power to choose another chief district court judge to replace a dissatisfactory one—even if that dissatisfaction does not rise to the level where discipline might be appropriate—the supreme court's authority to administer a 'unified court' is severely hamstrung." *Id.* (citing *Behrmann*, 225 Kan. at 441, 591 P.2d at 178 (stating that Article III, Section 1 provides for "a unified court with overall administrative authority in the supreme court branch thereof"). Thus, "[t]he Legislature *has* taken that power away from the Kansas Supreme Court and, thus, exerted itself over a fundamental component of the Judiciary." *Id.* at 32 (emphasis in original). (R. II, 149.)

Moreover, to repeat this Court's pronouncement in *State v. Greenlee*, "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." 228 Kan. 712, 719, 620 P.2d 1132, 1138 (1980) (emphasis added).

C. The Objective Sought to Be Attained by the Legislature Is Not Proper

The State also contends that Section 11 "serves worthy objectives" because the Legislature was motivated by "the practice of peer selection in other states," including Missouri, Nebraska, and Oklahoma, and by "the testimony of several district court judges in support of peer selection" when adopting Section 11. State Opening Brief at 23. However, in this case, the Legislature's true objective in enacting this provision was to disempower this Court. This is clearly demonstrated by the subsequent passage of 2015 House Bill 2005 and its non-severability provision, which would defund the entire judiciary should HB 2338 be declared unconstitutional. *See* 2015 Session Laws of Kansas, Vol. 1, Chapter 81 at 1085. As the district court observed, "[w]hen viewed together with § 29 of 2015 House Bill 2005, legitimate questions could be raised about the legislative purpose behind § 11 . . . [t]his, at least, calls into question any presumption the Court might otherwise give to the legislative motive at work in § 11." Memorandum Decision at 33. (R. II, 150.)

D. The Practical Result of Section 11 Is That This Court's Power to Select Chief Judges Has Been Usurped and Chief Judge Solomon's Legal Relations Have Been Significantly Altered

Finally, the State argues that Section 11 will not substantially interfere with this Court's general administrative authority. The State contends that there is no evidence that peer selection of chief judges in Missouri, Nebraska, and Oklahoma has interfered with the administrative authority of those states' supreme courts. But there is 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. The State further asserts 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." State Opening Brief at 25. That is a *de facto* nominating process, not a *de facto* selection process because this 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.

In contrast to these inapposite examples, the practical result of Section 11 is that this Court's Rule 107 has been invalidated by the Legislature. Consequently, this Court can no longer choose its chief district court judge delegates in discharging its Article III, Section 1 mandate to administer the State's unified court system.

Moreover, Chief Judge Solomon's legal relations with this Court have been significantly altered. Section 11 has disrupted a decades-long relationship between this Court and Chief Judge Solomon, whom the Court has repeatedly reappointed to serve as its delegate to discharge numerous administrative responsibilities for the 30th Judicial District. Section 11 has also disrupted Chief Judge Solomon's legal relations with his peer district court judges of the 30th Judicial District because it is now their assessment of Chief Judge Solomon that will determine whether he will retain his role as chief judge.

Conclusion

For all of the foregoing reasons, as well as those set forth in Chief Judge Solomon's opening brief, this Court should affirm the district court's holding that this matter is justiciable and that Section 11 of HB 2338 is unconstitutional as a violation of the separation-of-powers doctrine because it significantly interferes with this Court's

constitutional authority to administer Kansas's unified court system, thereby invalidating HB 2338 in its entirety due to that statute's non-severability provision.

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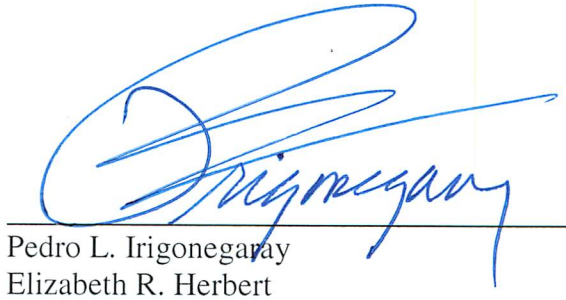

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