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

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

DEFENDANT'S COMBINED REPLY IN SUPPORT OF MOTION TO DISMISS AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant State of Kansas, by and through counsel, submits this combined reply in support of its motion to dismiss and response to Plaintiff Chief Judge Solomon's cross-motion for summary judgment. For the reasons set forth herein, the State requests that the Court grant its motion to dismiss and deny the cross-motion for summary judgment.

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Supplemental Statement of Facts

Since the State filed its Motion to Dismiss, the Legislature has passed, and the Governor has signed, 2015 House Bill 2005, which makes fiscal year 2016 and 2017 appropriations for the judicial branch. Section 29 of the bill provides:

> Except as provided further, the provisions of this act are not severable, *nor are they severable from the provisions of 2014 Senate Substitute for House Bill No. 2338, chapter 82 of the 2014 Session Laws of Kansas*. If any provision of this act or of 2014 Senate Substitute for House Bill No. 2338, chapter 82 of the 2014 Session Laws of Kansas, is stayed or is held to be invalid or unconstitutional, it shall be presumed conclusively that the legislature would not have enacted the remainder of this act without such stayed, invalid or unconstitutional provision

> and the provisions of this act are hereby declared to be null and void and shall have no force and effect. If the appropriations to the judicial branch for fiscal year 2016 or fiscal year 2017 are reduced below the amounts appropriated in this act by any other act of the 2015 or 2016 regular session of the legislature, the provisions of this section are hereby declared to be null and void and shall have no force and effect and the provisions of this act and of 2014 Senate Substitute for House Bill No. 2338, chapter 82 of the 2014 Session Laws of Kansas, are declared to be severable.

(Emphasis added). Thus, if this Court were to declare Section 11 of 2014 Senate Substitute for House Bill 2338 unconstitutional as Chief Judge Solomon requests, such a ruling would also invalidate 2015 House Bill 2005.

Argument

I. This Matter Fails to Present a Justiciable Case or Controversy.

As the party invoking this Court's jurisdiction, Chief Judge Solomon has the burden to establish he has standing. *See Gannon v. State*, 298 Kan. 1107, 1119, 1123 (2014). He has failed to meet this burden.

While Chief Judge Solomon is correct that the Kansas Supreme Court has described the standing inquiry as "less rigorous" in declaratory judgment cases, the Court has been clear that "actual cases and controversies are still required." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 897 (2008). And one of the hallmarks of a case or controversy is that the plaintiff must have suffered an injury that is concrete, particularized, and actual or imminent. *Gannon*, 298 Kan. at 1123. In the absence of such an injury, a declaratory judgment would be nothing more than a prohibited advisory opinion.

Chief Judge Solomon claims that he is not required to show an injury in fact because K.S.A. 60-1704, a declaratory judgment statute, grants him standing to sue. This argument overlooks the fact that the case or controversy requirement is constitutional in nature, rooted in the separation of powers and the meaning of 'judicial power." *See Morrison*, 285 Kan. at 898;

Gannon, 298 Kan. at 1120 ("[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 (2013) (plaintiffs must establish "traditional standing" even if they can show "statutory standing").

Chief Judge Solomon's current relationship with the Supreme Court has not been affected in any way. He remains chief judge of his district and will keep that position at least through January 1, 2016. His professional relationship is the same as ever. The only change is that the Supreme Court no longer has the legal authority to reappoint him; that decision is now left to his peers. At most, any change in the selection process is an injury to the Supreme Court, but Chief Judge Solomon has no standing to assert a claim on behalf of the Kansas Supreme Court as a third party. *See Sierra Club*, 298 Kan. at 33 ("To establish a cognizable injury, 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." (emphasis added)).

Whatever future effect, if any, HB 2338 may have on Chief Judge Solomon's relationship with his fellow judges in the 30th Judicial District also is not a legally cognizable injury. Although the judges of his district (including Chief Judge Solomon) will in the future be responsible for selecting the chief judge, Chief Judge Solomon is not even possibly harmed unless he loses his current position as chief judge. Any vague allegation of a "changed relationship" thus is wholly abstract, and not a concrete injury.

The only authority Chief Judge Solomon cites for the novel "changed relationship" theory of injury 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).

But even the concurring opinion in *Marchezak* does not support Chief Judge Solomon's standing argument. Indeed, to date, HB 2338, § 11, has not changed the terms on which Chief Judge Solomon does business with the Supreme Court; so long as he remains chief judge, his interactions with the Supreme Court are unaffected. Unlike the plaintiffs in *Marchezak*, Chief Judge Solomon has not been deprived personally of any legal right. Certainly, he has not suffered any *actual harm*, as the majority opinion in *Marchezak* required.

If a "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 a new power to the President vis-à-vis Congress, diminished their power as legislators and thereby affected their "relationship" with the executive branch. But the U.S. Supreme Court held the Members of Congress alleged only a "wholly abstract" institutional injury, and they therefore lacked standing. *Id.* at 829. The same is true here.

To be sure, Chief Judge Solomon *may* suffer a concrete and particularized injury *if* HB 2338 *in the future* causes him to lose his position as chief judge. But that injury is speculative, not "certainly impending" as required for standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). The judges in the 30th Judicial District may choose to retain Chief Judge

Solomon as chief judge, especially if he has a "harmonious relationship" with his fellow judges and is a successful administrator as his affidavit alleges. Solomon Affidavit ¶ 8. In that event, Chief Judge Solomon will never suffer any actual harm. In fact, HB 2338 could actually benefit Chief Judge Solomon. Even under Supreme Court Rule 107, he has no justified reliance interest in continuing to serve as chief judge; the Supreme Court could select someone else, just as his peers may. Chief Judge Solomon's expectation of continued service as chief judge is no greater under Supreme Court Rule 107 than under HB 2338.

Chief Judge Solomon also has not demonstrated that this matter is ripe, another element of the case or controversy requirement. *Gannon*, 298 Kan. at 1119. It is indisputable that he will be injured by HB 2338 only if his colleagues choose not to retain him as chief judge. Because that injury is hypothetical and may not ever occur, the matter is not ripe for decision at this time. *See Texas v. United States*, 523 U.S. 296, 300 (1998).

II. HB 2338, § 11, Does Not Unconstitutionally Infringe on the Kansas Supreme Court's General Administrative Authority.

Chief Judge Solomon fares no better on the merits. His primary argument hinges on the insupportable statement in *State v. Mitchell*, 234 Kan. 185 (1983), that when a Kansas statute conflicts with a Kansas court rule, the court rule "must prevail." That statement is not only dictum, but wrong. Because Section 11 of HB 2338 does not substantially interfere with the Kansas Supreme Court's general administrative authority, the statute cannot violate the separation of powers.

A. The insupportable statement in *State v. Mitchell* that a Supreme Court rule "must prevail" over a conflicting statute is dicta and necessarily erroneous.

In *State v. Mitchell*, 234 Kan. 185 (1983), the Kansas Supreme Court upheld a jury selection statute in the absence of a conflicting Supreme Court rule. The Court held that when

there is no conflict between court rules and legislation governing judicial administration, the judicial branch has *acquiesced* in the legislation and thus the legislation does not violate the separation of powers. *Id.* at 195 The Court's additional discussion of what might happen in the event of a conflict between court rules and legislation therefore was hypothetical and necessarily dictum.

Mitchell's statement about judicial acquiescence is questionable on the merits. If 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. After all, the U.S. Supreme Court, in contrast, 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 (1998) (holding that the line item veto violated the separation of powers, even though the Line Item Veto Act had been passed by Congress); *id.* at 452 (Kennedy, J., concurring) ("That a congressional cession 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.").

But even assuming the holding in *Mitchell* were correct, it does not logically follow that when a Supreme Court rule and a statute passed by the Legislature conflict, the Supreme Court rule "must prevail." That statement is not a necessary corollary of the Court's holding as Chief Judge Solomon argues. It would be quite reasonable to hold that (1) when Supreme Court rules and statutes of the Legislature are consistent, the legislative action is constitutional (on the theory that the Supreme Court is unlikely to agree to a significant interference with its authority) *and* (2) when there is a conflict, courts must employ the standard separation of powers analysis to determine whether the legislation significantly interferes with the Court's administrative

authority. At a minimum, *Mitchell*'s statement that a court rule "must prevail" over a conflicting statute was unnecessary to the decision and therefore is dictum.

Of course, dictum may serve as persuasive authority, but the *Mitchell* dictum fails to persuade. Chief Judge Solomon admits that the standard for determining a separation of powers violation is whether the challenged action *significantly interferes* with the operations of another branch. Solomon Memorandum at 9; *see State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84 (2008). The *Mitchell* dictum, however, goes much further, declaring that any statute which conflicts with a court rule is unconstitutional, no matter how trivial or nonexistent the interference.

In considering whether the action of one branch unconstitutionally interferes with the operations of another, Kansas courts consider the four factors identified and analyzed in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 884 (2008), and discussed below in the next section of this Memorandum. The *Mitchell* dictum would replace this test, used in every other separation of powers context, with a completely new and unprecedented standard: the Court always wins. That is not a legal standard, and it shows no respect for the decisions of coordinate branches of government.

The *Mitchell* dictum also cannot be justified by the Kansas Constitution. Article III, § 1, of the Kansas Constitution vests the judicial power exclusively in the judicial branch, but the Supreme Court's general *administrative* authority is not an aspect of the "judicial power," 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 (citing *State ex rel. Brewster v. Mohler*, 98 Kan. 465, 471

(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 1972 amendment gave the Supreme Court "general administrative authority over all courts in this state" as an *addition* to the Court's pre-existing judicial power. But, unlike the "judicial power," authority over court administration and procedure is not constitutionally or logically vested exclusively in the judicial branch. History and practice both belie any such suggestion. Otherwise the Legislature would have *no* authority to regulate judicial administration and procedure, even though it has done so in *numerous* instances since Kansas became a state. The more logical view is that such authority is part of the "legislative power" vested in the Legislature by Article II, § 1, of the Kansas Constitution, which is why the Legislature had the power to regulate judicial administration before 1972 and can continue to do so today.

B. HB 2338, § 11, Does Not Violate Separation of Powers Principles.

Although Chief Judge Solomon agrees that a separation of powers violation occurs when there is a significant interference by one branch with the operations of another, his argument as to why HB 2338, § 11, constitutes a significant interference falls back on his reading of the mistaken *Mitchell* dictum. The proper test for determining whether a significant interference has occurred, however, requires consideration of four factors: "(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 in blending of powers as shown by actual experience over a period of time." *Morrison*, 285 Kan. at 884 (brackets and ellipsis in original). 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 Power at Issue Here Is the Legislative Power to Create and Regulate State Offices and Officers.

Article II, § 1, of the Kansas Constitution vests the "legislative power of this state" in the Legislature. In exercising this power, the Legislature may pass statutes governing the executive and the judicial branches, as it has often done.

When it comes to public officers, the Constitution is even more specific. Article II, § 18, grants the Legislature authority to "provide for the election or appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution." This provision alone confirms the Legislature's authority to adopt HB 2338, § 11.

In a footnote, Chief Judge Solomon questions whether judges are "officers," citing the definition of "state officer or employee" in the State Governmental Ethics Law. *See* K.S.A. 46-221(a). But the fact that the Legislature chose to exclude judges from an ethics statute does not mean judges are not "officers" for purposes of the *Kansas Constitution*. To the contrary, the text of Article IV, § 3, demonstrates that judges are "officers" for constitutional purposes. *See* Kan. Const. art. IV, § 3 (providing that "all elected public officials in the state, except judicial *officers*" are subject to recall (emphasis added)).

Chief Judge Solomon also claims that the selection of chief judges is "otherwise provided for" in Article III, § 6. But that constitutional provision addresses only how district court judges are selected; it says nothing about the selection of *chief* judges. The position of chief judge is a *creature of statute*. Because the Kansas Constitution does not create the position of "chief judge," but the Legislature did, the Legislature has authority under Article II, § 18, to specify how chief judges are to be chosen.

Many of Chief Judge Solomon's arguments rest on a failure to distinguish between legislative power and administrative authority. The Supreme Court is given authority to

administer the judicial branch, just as the Governor is given authority to administer the executive branch. But in both cases, the Legislature retains legislative power under Article II to govern that administration.

Of course, it is possible the Legislature could go too far and significantly interfere with the administrative functions of the other branches, perhaps by trying effectively to administer the day-to-day operations of the courts or the executive branch. *Cf. State ex rel. Schneider v. Bennett*, 219 Kan. 285, 298 (1976) (a law giving the State Finance Council, a predominately legislative body, control over day-to-day operations of the Department of Administration was an unconstitutional usurpation of executive power by the Legislature). But a statute that specifies how statutorily-created public officers are chosen, like HB 2338, § 11, or any of the numerous statutes governing how executive branch officers are selected, *see, e.g.*, K.S.A. 74-601, is well within the Legislature's "legislative" authority.

2. HB 2338, § 11, Does Not Grant the Legislature Any Role in Selecting Chief Judges.

As to the second factor—the degree of control one branch exercises over another—HB 2338, § 11, simply modifies who *within the judicial branch* chooses chief judges; it does not give the Legislature or the Governor or any non-judicial branch officials any role in the process. The law also preserves the Kansas Supreme Court's general administrative control over chief judges, who remain "subject to supervision" by the Supreme Court, *see* K.S.A. 20-328, must comply with Supreme Court rules in their exercise of clerical and administrative functions, *id.*, and may be disciplined, suspended, or removed by the Supreme Court for cause under Article III, § 15, of the Kansas Constitution. Chief Judge Solomon argues that the fact the Legislature has no role in the selection of chief judges is "irrelevant" because "all that is required [for a separation of powers violation] is for one branch to 'significantly interfere' with the authority of another."

Solomon Memorandum at 18-19. But the degree of control one branch exercises over another is one of the four factors in the test the Kansas courts use to determine whether a significant interference has occurred, and here this factor strongly favors the State.

3. HB 2338, § 11, Furthers Proper and Reasonable Objectives.

Chief Judge Solomon appears to agree that the third factor in the separation of powers analysis—the objective sought to be attained—is the least relevant. This factor too, however, favors the State. The available legislative history indicates that in adopting peer selection of chief judges, the Legislature was influenced by practice in other states and by the preferences of several district court judges who provided testimony in support of the change. HB 2338, § 11, was a considered and reasonable policy decision, not a disguised attempt to harm the courts.

4. HB 2338, § 11, Does Not Have Adverse Consequences for the Administration of Justice or the Operation of the Courts in Practice.

The fourth and final factor in the separation of powers analysis is the practical result as shown by actual experience. Here, actual experience demonstrates that peer selection will not seriously interfere with the Kansas Supreme Court's general administrative authority or undermine the courts' ability to administer justice.

The legislative history of HB 2338 indicates that peer selection was already the *de facto* policy in both Johnson and Sedgwick counties (the two most populous counties in the State) even before HB 2338 was enacted. While it is true, as Chief Judge Solomon notes, that this *de facto* process did not prevent a disappointed colleague from applying for the position, or the Supreme Court from choosing someone who had not applied, the legislative history suggests that the judges preferred by their peers typically were appointed by the Supreme Court. *See* Written Testimony of the Honorable Eric R. Yost, District Judge, 18th Judicial District, before the Kansas Senate Judiciary Committee in support of SB 364 and 365 (Feb. 17, 2014) (Exhibit 2 to

the State's Memorandum in Support of Motion to Dismiss) ("And truth be told, we already have such a *de facto* selection process [in] both Johnson and Sedgwick County."). There is no suggestion that this *de facto* practice somehow interfered with the Supreme Court's administrative authority.

Chief judges are also chosen by their peers in the surrounding states of Nebraska, Missouri, and Oklahoma, even though these states all have constitutional provisions similar to Kansas, provisions that give general administrative or supervisory authority to their supreme courts. In response to this point, Chief Judge Solomon once again falls back on the *Mitchell* dictum, claiming that perhaps the supreme courts in these surrounding states have acquiesced in peer selection. But the question is whether the practice of peer selection of chief judges significantly interferes with a supreme court's administrative authority, not "acquiescence." Chief Judge Solomon does not even try to explain (and it is difficult to see how he could) why peer selection would significantly interfere only with the Kansas Supreme Court's administrative authority but not with the same authority of the supreme courts of our neighbor states of Nebraska, Missouri, and Oklahoma. There is no significant interference.

Chief Judge Solomon does not even address the federal system. Congress has specified how chief judges for the federal circuits and the U.S. district courts are to be selected, and the U.S. Supreme Court plays *no role* in the selection process whatsoever. *See* 28 U.S.C. § 45 (courts of appeals); 28 U.S.C. § 136 (district courts). This further undermines Chief Judge Solomon's claim that altering the selection method for chief judges will violate the separation of powers or interfere with judicial independence.

Ultimately, all four factors in the separation of powers analysis support the constitutionality of HB 2338, § 11. The law is an exercise of the Legislature's constitutionally

delegated legislative power to determine how public officers are selected, it gives no non-judicial branch official any no role in the actual selection of chief judges while preserving the Supreme Court's administrative authority to supervise the chief judges, it represents a reasonable and considered policy choice, and practical experience in several neighboring states demonstrates that peer selection will not significantly interfere with the Kansas Supreme Court's administrative authority. At the very least, HB 2338, § 11, does not *clearly* violate the Constitution as it must for Chief Judge Solomon to prevail. *See State ex rel. Schneider v. Bennett*, 219 Kan. 285, 289 (1976). The Court should grant the State's Motion to Dismiss.

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The material facts alleged in Chief Judge Solomon's Petition and described in the State's Memorandum in Support of its Motion to Dismiss are sufficient to decide this case as a matter of law. Those material facts are not in dispute. Chief Judge Solomon's Memorandum and Affidavit, however, introduce several new factual allegations. These include allegations that:

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

- Chief Judge Solomon and other chief judges meet in private with the Supreme Court at least twice a year to discuss staffing, budgetary issues, and strategy for working with the Legislature. (Solomon Affidavit ¶ 4.)

- Chief Judge Solomon also has had special meetings with the Supreme Court regarding budget shortfalls and the Supreme Court has asked him twice to lead discussions among other district court chief judges concerning these issues. (Solomon Affidavit ¶ 4.)

- Chief Judge Solomon occasionally receives requests from his departmental justice, or the chief justice, seeking information or opinions regarding certain issues. (Solomon Affidavit ¶ 5.)

- Chief Judge Solomon has a close working relationship with the Kansas Supreme Court based on trust and confidence. (Solomon Affidavit ¶ 6.)

- Chief Judge Solomon has developed a significant relationship, and goodwill, with the county commissions in all five counties in the 30th Judicial District, as well as with the public and press. (Solomon Affidavit ¶ 7.)

- Chief Judge Solomon has a harmonious relationship with his 6 fellow judges and 35 staff, and there have never been significant personnel or budget problems in the 30th Judicial District requiring the involvement of the Supreme Court. (Solomon Affidavit ¶ 8).

Because the State has not had any opportunity to conduct discovery, the State is not in a position to admit or deny these factual allegations at this time. That said, none of the allegations are material to the State's Motion to Dismiss, which should be granted even if the allegations are assumed to be true. If this Court disagrees, however, the State requests an opportunity to conduct discovery regarding these new allegations before the Court rules on Chief Judge Solomon's motion for summary judgment.

Response to Chief Judge Solomon's Contentions of Fact

Pursuant to Supreme Court Rule 141(b)(1), the State responds to Chief Judge Solomon's factual contentions as follows:

1. Uncontroverted.

2. Uncontroverted.

3. Uncontroverted.

4. Uncontroverted for purposes of this motion only because the State has not yet had an opportunity to conduct discovery. The State does not dispute that Chief Judge Solomon has served as chief judge for many years, but there is no evidence in the record, other than Chief Judge Solomon's untested affidavit, regarding his working relationship with the Supreme Court or the amount of trust and confidence it involves.

5. Uncontroverted for purposes of this motion only because the State has not yet had an opportunity to conduct discovery. The State does not doubt that Chief Judge Solomon deals with budget and personnel issues as well as with county commissions, the press, and the public to some degree. But there is no evidence in the record, other than Chief Judge Solomon's untested affidavit, about the extent of these administrative responsibilities or whether Chief Judge Solomon has developed "goodwill" with county commissioners, the public, and the press.

6. Uncontroverted for purposes of this motion only because the State has not yet had an opportunity to conduct discovery. There is no evidence in the record, other than Chief Judge Solomon's untested affidavit, regarding Chief Judge Solomon's interactions with the Supreme Court.

7. Uncontroverted for purposes of this motion only because the State has not yet had an opportunity to conduct discovery. There is no evidence in the record, other than Chief Judge Solomon's untested affidavit, about special meetings with the Supreme Court or Chief Judge Solomon's relationship with the chief judges of other district courts.

8. Uncontroverted.

9. Uncontroverted.

Argument

I. Chief Judge Solomon Is Not Entitled to Summary Judgment Because HB 2338, § 11 Does Not Violate the Separation of Powers.

Chief Judge Solomon's motion for summary judgment should be denied because HB 2338, § 11 does not significantly interfere with the Supreme Court's administrative authority. Therefore, Chief Judge Solomon is not "entitled to judgment as a matter of law." K.S.A. 60-256(c)(2).

As thoroughly argued in the State's motion to dismiss, Chief Judge Solomon's reliance on *State v. Mitchell* is misplaced because the statement in *Mitchell* that Supreme Court rules "must prevail" over conflicting statutes is dictum, not binding precedent. It also is an inaccurate statement of law because a separation of powers violation occurs only when the action of one branch significantly interferes with the operations of another. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84 (2008).

In determining whether a significant interference has occurred, Kansas courts consider four factors, all of which favor the State. First, HB 2338, § 11, is an exercise of the Legislature's legislative power under Article II, § 1, of the Kansas Constitution as well as its authority under Article II, § 18, to determine how public officers are selected. Second, the statute does not give the Legislature or the Governor or any non-judicial branch official any role in the actual appointment of district court chief judges and instead preserves the Kansas Supreme Court's general administrative authority to supervise the chief judges. Third, peer selection was a reasonable and considered policy decision based on practice in other states and the preferences of several Kansas district court judges. Finally, the *de facto* peer selection process currently used in the largest two counties of Kansas, the practice of peer selection in surrounding states with similar constitutional provisions regarding their supreme courts' administrative authority, and the fact that the U.S. Supreme Court does not select federal chief judges, all demonstrate that peer selection will not significantly interfere with the Kansas Supreme Court's general administrative authority. Chief Judge Solomon certainly has not shown that HB 2338, § 11, *clearly* violates the separation of powers, as he must. *See State ex rel. Schneider v. Bennett*, 219 Kan. 285, 289 (1976).

II. To the extent anything turns on the newly alleged facts in Chief Judge Solomon's Affidavit, this Court should allow the State to conduct discovery.

The State does not believe that any of the newly alleged facts in Chief Judge Solomon's Memorandum and Affidavit are material to the resolution of this matter. If this Court determines otherwise, however, the State should have an opportunity to conduct discovery regarding the new information—which has been introduced through an untested affidavit—before ruling on the motion for summary judgment.

Ordinarily, summary judgment is appropriate only if the nonmoving party has had an adequate opportunity to conduct discovery. *See, e.g.*, *N. Natural Gas Co. v. ONEOK Field Servs. Co.*, 296 Kan. 906, 935 (2013); *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"). In this case, Chief Judge Solomon filed his motion for summary judgment without any discovery by either party.

K.S.A. 60-256(f) protects parties from premature summary judgment motions, providing:

> If a party opposing the motion shows by affidavit or by declaration pursuant to K.S.A. 53-601, and amendments thereto, that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) Deny the motion;
>
> (2) order a continuance to enable affidavits or declarations to be obtained, depositions to be taken or other discovery to be undertaken; or
>
> (3) issue any other just order.

The attached Affidavit pursuant to K.S.A. 60-256(f) explains that in the event any of the newly alleged facts are determined to be material, the State is unable to present facts essential to justify its opposition to the motion for summary judgment at this time because the State has not had any opportunity to conduct discovery.

If, in this Court's view, the resolution of this case turns on the newly alleged facts in Chief Judge Solomon's Memorandum and Affidavit, the Court should either deny summary judgment, or delay ruling to allow the State to conduct discovery regarding the new allegations. Unlike the undisputed factual allegations in the Petition and described in the State's Memorandum, the factual allegations presented in Chief Judge Solomon's Memorandum and Affidavit are personal in nature and relate to his relationship with the Supreme Court, other judges, and the public generally. In order to determine the validity of these alleged facts, the State needs to conduct discovery, including a deposition of Chief Judge Solomon. As it stands, the only evidence in the record to support the new, alleged facts is Chief Judge Solomon's untested affidavit.

The need for discovery is particularly acute given that many of the alleged facts are stated in general and sweeping terms, such as the statements that (1) Chief Judge Solomon's relationship with the Supreme Court involves a "significant level of communication, trust and candor;" (2) he has developed a "significant relationship, and goodwill, with" county commissioners, the public, and the press; and (3) he has a "harmonious relationship" with his fellow judges. If any of these issues are, in this Court's view, material (and, again, the State's position is that they are not), the State should have an opportunity to examine and test the allegations before this Court relies on them to decide the summary judgment motion.

CONCLUSION

The State of Kansas respectfully requests that the Court dismiss 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, nor is this matter ripe for decision.

If the Court reaches the merits, Chief Judge Solomon's Petition should be dismissed for failure to state a claim because HB 2338, § 11, does not significantly interfere with the Kansas Supreme Court's general administrative authority. The Legislature has the constitutional authority to determine how chief judges are selected, HB 2338 gives the Legislature no role in the actual selection of the chief judges, and peer selection is a reasonable policy decision consistent with widespread practice among the states. The Court should deny Chief Judge Solomon's motion for summary judgment for the same reasons.

Respectfully submitted,

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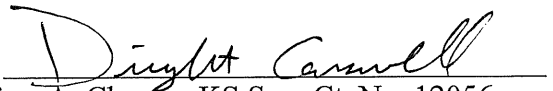
By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of June, 2015, a true and correct copy of the above document was mailed, postage prepaid, to:

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

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

AFFIDAVIT PURSUANT TO K.S.A. 60-256(f)

STATE OF KANSAS)
) **ss:**
COUNTY OF SHAWNEE)

COMES NOW, Dwight R. Carswell, a member of the Bar of the State of Kansas and of lawful age, and being first duly sworn upon his oath, avers and states as follows regarding Plaintiff's Motion for Summary Judgment in *Solomon v. State of Kansas*, Shawnee County District Court Case No. 2015-cv-156:

1. This affidavit is submitted pursuant to K.S.A. 60-256(f), which provides:

   If a party opposing the [summary judgment] motion shows by affidavit or by declaration pursuant to K.S.A. 53-601, and amendments thereto, that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

   (1) Deny the motion;

   (2) order a continuance to enable affidavits or declarations to be obtained, depositions to be taken or other discovery to be undertaken; or

   (3) issue any other just order.

2. As described in the State's Combined Reply in Support of Motion to Dismiss and Response to Plaintiff's Motion for Summary Judgment, Chief Judge Solomon's untested affidavit in support of his motion for summary judgment introduces several new factual allegations, including allegations that:

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

    - Chief Judge Solomon and other chief judges meet in private with the Supreme Court at least twice a year to discuss staffing, budgetary issues, and strategy for working with the Legislature. (Solomon Affidavit ¶ 4.)

    - Chief Judge Solomon also has had special meetings with the Supreme Court regarding budget shortfalls and the Supreme Court has asked him twice to lead discussions among other district court chief judges concerning these issues. (Solomon Affidavit ¶ 4.)

    - Chief Judge Solomon occasionally receives requests from his departmental justice, or the chief justice, seeking information or opinions regarding certain issues. (Solomon Affidavit ¶ 5.)

    - Chief Judge Solomon has a close working relationship with the Kansas Supreme Court based on trust and confidence. (Solomon Affidavit ¶ 6.)

    - Chief Judge Solomon has developed a significant relationship, and goodwill, with the county commissions in all five counties in the 30th Judicial District, as well as with the public and press. (Solomon Affidavit ¶ 7.)

    - Chief Judge Solomon has a harmonious relationship with his 6 fellow judges and 35 court staff members, and there have never been significant personnel or budget problems in the 30th Judicial District requiring the involvement of the Supreme Court. (Solomon Affidavit ¶ 8).

3. Chief Judge Solomon's motion for summary judgment was filed before discovery by either party.

4. In the event any of the allegations above are determined to be material (and the State believes they are not), the State is unable to present facts essential to justify its opposition to the motion for summary judgment at this time because the State has not had any opportunity to conduct discovery.

FURTHER AFFIANT SAITH NOT

Dwight R. Carswell, No. 25111
Assistant Solicitor General

Subscribed and sworn to before me this 15 day of June, 2015.

Donna R. Wells
NOTARY PUBLIC—STATE OF KANSAS
EXP: 11-20-2017

Notary Public