

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

HONORABLE ROBERT FAIRCHILD, CHIEF JUDGE,
7TH JUDICIAL DISTRICT;
HONORABLE JEFFRY L. JACK, DISTRICT JUDGE,
11TH JUDICIAL DISTRICT;
HONORABLE LARRY T. SOLOMON, CHIEF JUDGE,
30TH JUDICIAL DISTRICT;
HONORABLE MERYL D. WILSON, CHIEF JUDGE,
21ST JUDICIAL DISTRICT;

Plaintiffs,

-vs.-

THE STATE OF KANSAS,

Defendant.

CASE NO.

PETITION FOR DECLARATORY JUDGMENT

COME NOW Plaintiffs, the Honorable Robert Fairchild, Chief Judge, 7th Judicial District; the Honorable Jeffry L. Jack, District Judge, 11th Judicial District; the Honorable Larry T. Solomon, Chief Judge, 30th Judicial District; and the Honorable Meryl D. Wilson, Chief Judge, 21st Judicial District, and for their causes of action allege and state as follows:

NATURE OF THE ACTION

1. This is an action under K.S.A. § 60-1704 for a judgment declaring that Section 29 (hereinafter “the non-severability provision”) of 2015 House Bill 2005, Chapter 81 of the 2015 Session Laws of Kansas (hereinafter “HB 2005”) is unconstitutional and unenforceable while the remainder of the statute continues in full force and effect.

2. As mandated by Article XI, § 4 of the Kansas Constitution, HB 2005 was enacted to appropriate funding for the Kansas judiciary for fiscal years 2016 and 2017. However, the non-severability provision states that in the event that any provision of HB 2005 or of an earlier enactment, 2014 Senate Substitute for House Bill 2338, Chapter 82 of the 2014 Session Laws of Kansas (hereinafter “HB 2338”), is “held to be invalid or unconstitutional . . . *the provisions of this act are hereby declared to be null and void and shall have no force and effect,*” (emphasis added), thereby effectively defunding the Kansas judiciary through the end of fiscal year 2017.

3. As alleged in more detail in Counts I-IV below, the non-severability provision is unconstitutional because it:

- (a) significantly interferes with the judicial branch’s exclusive constitutional authority under Article III, § 1 of the Kansas Constitution to hear and decide cases on the merits without fear or favor and, therefore, violates the separation-of-powers doctrine (Count I);
- (b) violates Article III, § 13 of the Kansas Constitution by threatening a diminution of judges’ compensation during their terms of office, not applicable by general law to all salaried officers of the State (Count II);
- (c) violates Article XI, § 4 of the Kansas Constitution by creating unauthorized conditions on the legislature’s constitutional obligation to fund the Kansas judiciary that serve no legitimate State interest (Count III); and
- (d) violates the due process rights of litigants challenging the constitutionality of any provision of HB 2338 by creating an undue temptation for a court to reject such a challenge for fear that the entire judiciary will lose its funding, including funding

to pay judicial salaries, if the challenged provision of HB 2338 were held unconstitutional (Count IV).

THE PARTIES

4. Plaintiff Robert Fairchild is the chief judge of the 7th Judicial District in Kansas. Judge Fairchild joined the district court bench in 1996 and was first appointed chief judge of the 7th Judicial District in 2002.

5. Plaintiff Jeffrey L. Jack is a district court judge of the 11th Judicial District in Kansas, having first joined that bench in 2005.

6. Plaintiff Meryl D. Wilson is the chief judge of the 21st Judicial District. Judge Wilson joined that court in 1997 and was appointed chief judge in 2012.

7. Plaintiff Larry T. Solomon is the chief judge of the 30th Judicial District in Kansas, having first joined that bench in 1989. On July 1, 1991, the Kansas Supreme Court named Judge Solomon chief judge of the 30th Judicial District, a position he has held for more than 23 years, having been reappointed bi-annually ever since. Chief Judge Solomon is the plaintiff in *Solomon v. Kansas*, referenced above and described more fully below. The non-severability provision of HB 2005 jeopardizes Chief Judge Solomon's constitutional right to a fair and impartial adjudication of *Solomon v. Kansas* by conditioning the continued funding of the Kansas judiciary on the rejection of his claim in that lawsuit, thus threatening Chief Judge Solomon with particularized injury that goes beyond any damage sustained by the public generally.

8. In addition, in the event that the non-severability provision is triggered, the resultant defunding of the Kansas judiciary will cause each of the Plaintiffs direct, personal and pecuniary injury that goes beyond any damage sustained by the public generally. Each

Plaintiff's judicial salary will be diminished, if not totally eliminated, until the end of fiscal year 2017, resulting in an adverse impact on his ability to meet his financial obligations and on his creditworthiness, which will differ from judge to judge.

9. Defendant State of Kansas, admitted in 1861 as the 34th state of the United States of America, is a state governmental entity that may be served with process by serving Kansas Attorney General Derek Schmidt at Memorial Hall, 2nd Floor, 120 SW 10th Avenue; Topeka, Kansas 66612-1597.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this action pursuant to K.S.A. § 60-1701, *et seq.*

11. Venue is proper in Shawnee County because the State of Kansas maintains its principal offices there and any orders implementing the subject legislation will emanate from Shawnee County.

BACKGROUND

12. On April 17, 2014, Governor Brownback signed HB 2338 into law, with an effective date of July 1, 2014. Section 11 of HB 2338 provides, in relevant part, that “[i]n every judicial district, the district court judges in such judicial district shall elect a district judge as chief judge who shall have general control over the assignment of cases within the district, subject to supervision by the supreme court. The procedure for such election shall be determined by the district court judges and adopted by district court rule.”

13. In addition, Section 43 of HB 2338 provides that “[t]he provisions of this act are not severable. If any provision of this act 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 such act without such stayed, invalid or unconstitutional provision.”

14. On February 18, 2015, Chief Judge Solomon filed a petition for declaratory judgment in this Court entitled *Solomon v. Kansas*, Case No. 2015-CV-156, seeking to declare Section 11 of HB 2338 unconstitutional as a violation of Article III, § 1 of the Kansas Constitution and the separation-of-powers doctrine, and declaring all of HB 2338 invalid by virtue of Section 43 thereof. The State then moved to dismiss Judge Solomon’s petition and Judge Solomon cross-moved for summary judgment.

15. On June 4, 2015, in the midst of the parties’ briefing in *Solomon v. Kansas*, Governor Brownback signed HR 2005 into law, which appropriates the funding for the Kansas judicial branch for fiscal year 2016, ending June 30, 2016, and fiscal year 2017, ending June 30, 2017, respectively.

16. HB 2005 is mandated by Article XI, § 4 of the Kansas Constitution, which states: “The legislature *shall* provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years.” (Emphasis added.)

17. Although Article XI, § 4 of the Kansas Constitution represents an unconditional direction, the legislature nevertheless added a non-severability provision at the end of the statute that conditions the judiciary’s funding for fiscal years 2016 and 2017 on the courts not invalidating any provision of either HB 2338 or HB 2005. In relevant part, that provision, New Sec. 29, states:

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.

18. On information and belief, the purpose of the non-severability provision is to deter the courts of Kansas from declaring the non-severability provision itself or any provision of HB 2338 unconstitutional, lest the State judiciary lose its funding through June 30, 2017.

19. The fact that Chief Judge Solomon's constitutional challenge to Section 11 of HB 2338 was already pending at the time the legislature engrafted the non-severability provision onto HB 2005 further suggests that the provision is an attempt to influence the judiciary to rule against Chief Judge Solomon in *Solomon v. Kansas*.

20. The State's conduct also shows that the purpose of HB 2005's non-severability provision is to influence pending litigation. Instead of starting its reply brief in *Solomon v. Kansas* with a defense of its motion to dismiss on the merits, the State informed this Court that should it rule in Chief Judge Solomon's favor and declare Section 11 of HB 2338 unconstitutional, thereby invalidating HB 2338 in its entirety, the consequence would be that the Kansas judiciary would lose its appropriations through fiscal year 2017 by virtue of HB 2005's non-severability provision. There was no reason to so advise the Court other than to influence it to reject Judge Solomon's constitutional challenge to Section 11 of HB 2338.

21. Following oral argument in *Solomon v. Kansas*, on September 2, 2015, Judge Hendricks of this Court held that Section 11 of HB 2338 was a violation of Article III, § 1 of the Kansas Constitution and the separation-of-powers doctrine. However, in order to prevent the automatic defunding of the Kansas judiciary by virtue of HB 2005's non-severability provision, which the state has admitted "would cause irreparable injury to both parties and the public at large," Judge Hendricks granted the state's request, unopposed by plaintiff, to stay the effective date of his ruling until final resolution on appeal to the Kansas Supreme Court.

THE NEED FOR TWO-PRONGED DECLARATORY RELIEF

22. To effectively remedy the constitutional violations alleged in Counts I-IV below, it will not be sufficient for the judgment simply to declare that the non-severability provision is unconstitutional. That is because the provision states “it shall be presumed conclusively that the legislature would not have enacted the remainder of [HB 2005]” — the appropriations for the judiciary for fiscal years 2016 and 2017 — without the non-severability provision. By its terms, then, if the non-severability provision is declared unconstitutional without more, that ruling will trigger the defunding of the Kansas court system through June 30, 2017.

23. To prevent such a perverse result, the declaratory judgment in this case should also provide that while the non-severability provision is unenforceable, the remainder of HB 2005 shall continue in full force and effect. This result is consistent with the fact that the legislature is constitutionally required to appropriate funds for the judiciary pursuant to Article XI, § 4 of the Kansas Constitution. *See* Count III, below.

COUNT I THE NON-SEVERABILITY PROVISION VIOLATES THE SEPARATION-OF-POWERS DOCTRINE (On behalf of all Plaintiffs)

24. Although the Kansas Constitution contains no express provision adopting the doctrine of separation of powers, it has long been recognized that the doctrine is inherent in the very structure of the three-branch system of government. The government is divided into three branches, *i.e.*, legislative, executive and judicial, each of which is given the powers and functions appropriate to it. The doctrine of separation of powers is violated whenever one branch of government significantly interferes with the function of another branch.

25. Under Article III, § 1 of the Kansas Constitution, “[t]he judicial power of this state shall be vested exclusively in one court of justice,” *i.e.*, the unified court system.

Traditionally, “judicial power” has been defined as the power to hear and decide cases on the merits without fear of or favor to any party. By conditioning the judiciary’s continued funding through fiscal year 2017 on this Court (or, on appeal, the Kansas Supreme Court) resolving *Solomon v. Kansas* against Judge Solomon’s challenge to Section 11 of HB 2338 and in favor of the constitutionality of that provision, the non-severability provision of HB 2005 constitutes a significant interference with the judiciary’s exclusive power to hear and decide cases under Article III, § 1 of the Kansas Constitution, and thus violates the separation-of-powers doctrine.

26. Because Chief Judge Solomon’s right to a fair and impartial adjudication in *Solomon v. Kansas* is compromised by the non-severability provision, he has a personal stake in the outcome of this lawsuit and, therefore, standing to challenge the provision’s constitutionality under the separation-of-powers doctrine. The danger posed by the non-severability provision to Judge Solomon’s right to a fair and impartial adjudication will remain pending an appeal of Judge Hendricks’ ruling. While Plaintiffs do not doubt the fairness and integrity of the Kansas Supreme Court, in such circumstances prejudice to Judge Solomon is presumed.

27. Because the non-severability provision threatens all the Plaintiff-judges in this action with loss of their judicial salaries as a result of a ruling in Judge Solomon’s favor in *Solomon v. Kansas*, they each have a personal stake in the outcome of this lawsuit and, therefore, standing to challenge the provision’s constitutionality under the separation-of-powers doctrine.

COUNT II
THE NON-SEVERABILITY PROVISION VIOLATES
ARTICLE III, § 13 OF THE KANSAS CONSTITUTION
(On behalf of all Plaintiffs)

28. Article III, § 13 of the Kansas Constitution provides that the compensation of the justices of the Supreme Court and the judges of the district courts “shall not be diminished during their terms of office, unless by general law applicable to all salaried officers of the state.”

29. “[T]he underlying purpose of the proscription against diminishing judicial compensation was to assure an independent judiciary” by protecting the Kansas courts from undue interference by the legislature through control of the judiciary’s livelihood. Kan. Atty. Gen. Op. No. 87-2 (Jan. 9, 1987).

30. By conditioning the judiciary’s continued funding through fiscal year 2017 — including the payment of judicial salaries — on this Court (or, on appeal, the Kansas Supreme Court) resolving *Solomon v. Kansas* against Judge Solomon’s challenge to Section 11 of HB 2338 and in favor of the constitutionality of that provision, the non-severability provision violates both the letter and purpose of Article III, § 13 of the Kansas Constitution.

31. Because the non-severability provision threatens all the Plaintiff-judges in this action with loss of their judicial salaries as a result of a ruling in Judge Solomon’s favor in *Solomon v. Kansas*, they each have standing to challenge the non-severability provision as a violation of Article III, § 13 of the Kansas Constitution. Separately, because the threatened loss of judicial salaries compromises the impartiality of the judges adjudicating *Solomon v. Kansas*, Judge Solomon has standing to challenge the non-severability provision as a violation of Article III, § 13 of the Kansas Constitution.

COUNT III
THE NON-SEVERABILITY PROVISION VIOLATES
ARTICLE XI, § 4 OF THE KANSAS CONSTITUTION
(On behalf of all Plaintiffs)

32. The judicial funding for fiscal year 2016 and 2017 provided by HB 2005 is mandated by Article XI, § 4 of the Kansas Constitution, which states: “The legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years.” Article XI, § 4 is an unqualified command to the legislature; it allows for no exceptions or conditions.

33. By conditioning the judiciary's continued funding through fiscal year 2017 -- including the payment of judicial salaries -- on this Court (or, on appeal, the Kansas Supreme Court) resolving *Solomon v. Kansas* against Judge Solomon's challenge to Section 11 of HB 2338 and in favor of the constitutionality of that provision, the non-severability provision violates the unqualified command of Article XI, § 4 of the Kansas Constitution.

34. Because the non-severability provision threatens all the Plaintiff-judges in this action with loss of their judicial salaries as a result of the ruling in Judge Solomon's favor in *Solomon v. Kansas*, they each have standing to challenge the non-severability provision as a violation of Article XI, § 4 of the Kansas Constitution. Separately, because the threatened loss of judicial salaries compromises the impartiality of the judges adjudicating *Solomon v. Kansas*, Judge Solomon has standing to challenge the non-severability provision as a violation of Article XI, § 4 of the Kansas Constitution.

COUNT IV
THE NON-SEVERABILITY PROVISION VIOLATES
THE DUE PROCESS RIGHTS OF LITIGANTS
CHALLENGING ANY PROVISION OF HB 2338
(On behalf of Chief Judge Solomon)

35. The due process clause of the Fifth Amendment of the United States Constitution, as applied to the states through incorporation by the Fourteenth Amendment, guarantees every litigant a fair and impartial tribunal free of any personal interest in the outcome of the controversy. Any undue temptation that might lead a judge not to hold the balance between the parties nice, clear and true violates due process.

36. The non-severability provision of HB 2005 creates precisely such an undue temptation by conditioning the judiciary's continued funding through fiscal year 2017 on this Court (or, on appeal, the Kansas Supreme Court) resolving *Solomon v. Kansas* against Judge

Solomon's challenge to Section 11 of HB 2338. The non-severability provision gives any judge or judges adjudicating Judge Solomon's challenge a personal stake in rejecting his claim because they will lose their judicial salaries through the end of fiscal year 2017 if the judiciary is defunded as a result of a ruling in Judge Solomon's favor declaring Section 11 of HB 2338 unconstitutional.

37. Because the non-severability provision compromises Chief Judge Solomon's right to a fair and impartial adjudication in *Solomon v. Kansas*, he has a personal stake in the outcome of this lawsuit and, therefore, standing to challenge the provision's constitutionality as a violation of his due process rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

- a. A judgment and order declaring that the non-severability provision of HB 2005 is unconstitutional and, therefore, unenforceable;
- b. A judgment and order declaring that the remainder of HB 2005 continues in full force and effect;
- c. The costs of this action; and
- d. Such other relief as this Court deems just and equitable.

Respectfully submitted,

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