IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION SIX

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

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court upon the Motion to Dismiss and accompanying Memorandum in Support, filed by Defendant State of Kansas ("Defendant") on March 26, 2015; the Cross-Motion for Summary Judgment and accompanying Memorandum, filed by Plaintiff Larry T. Solomon ("Plaintiff") on May 14, 2015; the Defendant's Combined Reply, filed on June 15, 2015; and the Plaintiff's Reply Memorandum, filed on July 8, 2015. The Court heard oral arguments on these matters on August 28, 2015, and the motions are ripe for ruling. After due and careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

In 2014, the Kansas Legislature passed Senate Substitute for House Bill 2338 ("the Senate Substitute"). Section 11 ("§ 11") of the Senate Substitute purported to alter the way chief judges are selected in this state, transferring the power to select chief judges from the Kansas Supreme Court to the individual judges of each judicial district.

This case comes before the Court as a declaratory judgment action pursuant to K.S.A. 60-1704. The Plaintiff, who is also the Chief Judge of the 30th Judicial District, claims that the

legislative enactment of Senate Substitute—and, in particular, of § 11—is an unconstitutional violation of Article III, Sec. 1, of the Kansas Constitution, and of the separation of powers doctrine. The Plaintiff filed his Petition on February 18, 2015. In response, the Defendant filed the present Motion to Dismiss on March 26, 2015. The Plaintiff then filed a joint Response to the Motion to Dismiss and Cross-Motion for Summary Judgment on May 14, 2015. The Defendant and the Plaintiff each filed subsequent replies on June 15, 2015, and July 8, 2015, respectively. The Court heard oral arguments on August 28, 2015, and took the matter under advisement.

STATEMENT OF FACTS

1. In 2014, the Kansas Legislature passed Senate Substitute for House Bill 2338.
2. Governor Brownback signed the Senate Substitute into law as L. 2014, ch. 82.
3. § 11 of the Senate Substitute amended K.S.A. 20-329 to read as follows:

> In 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. Within guidelines established by statute, rule of the supreme court or the district court, the chief judge of each district court shall be responsible for and have general supervisory authority over the clerical and administrative functions of such court. The district judge designated as chief judge by the supreme court on July 1, 2014, shall be allowed to serve as chief judge through January 1, 2016.

Previously, K.S.A. 20-329 provided:

> In every judicial district, the supreme court shall designate 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. Within guidelines established by statute, rule of the supreme court or the district court, the chief judge of each district court shall be responsible for and have general supervisory authority over the clerical and administrative functions of such court.

4. Kansas Supreme Court Rule 107(a)(1) (2014 Kan. Ct. R. Annot. 217–20) provides that "The Supreme Court will appoint a chief judge in each judicial district."
5. The Plaintiff is the Chief Judge of the 30th Judicial District.
6. Pursuant to § 11, the Plaintiff will remain Chief Judge of the 30th Judicial District until January 1, 2016, at which point, under the terms of § 11, the judges of the 30th Judicial District will elect a Chief Judge.

STANDARD OF REVIEW

I. MOTION TO DISMISS

A. Motion to Dismiss on Justiciability Grounds

1. Lack of Subject Matter Jurisdiction

A motion to dismiss for lack of standing—which is a component of subject matter jurisdiction—is governed by K.S.A. 60-212(b)(1). *Cf. State v. Ernesti*, 291 Kan. 54, 60, 239 P.3d 40 (2010) (noting that "standing is a component of subject matter jurisdiction . . ."). If the Court determines that it lacks subject matter jurisdiction, the Court must dismiss the action. K.S.A. 60-212(g)(3).

In adjudicating questions of subject matter jurisdiction, it is important to keep the following principles in mind:

> Subject matter jurisdiction is vested by statute or constitution and establishes the court's authority to hear and decide a particular type of action. Parties cannot confer subject matter jurisdiction upon the courts by consent, waiver, or estoppel. Parties cannot confer subject matter jurisdiction by failing to object to the court's lack of jurisdiction. If a trial court determines that it lacks subject matter jurisdiction, it has absolutely no authority to reach the merits of the case and is required as a matter of law to dismiss it.

Chelf v. State, 46 Kan. App. 2d 522, 529, 263 P.3d 852 (2011). The Kansas Court of Appeals has

noted that, "Typically, the party asserting subject matter jurisdiction bears the burden of proof." *Purdum v. Purdum*, 48 Kan. App. 2d 938, 994, 301 P.3d 718 (2013).

Because challenges to standing are subject matter jurisdiction challenges, the Kansas Supreme Court has also written that, "The burden to establish [the] elements of standing rests with the party asserting it." *Gannon v. State*, 298 Kan. 1107, 1123, 319 P.3d 1196 (2014). Furthermore:

> **[T]he nature of that burden depends on the stage of the proceedings because the elements of standing are not merely pleading requirements.** Each element must be proved in the same way as any other matter and with the degree of evidence required at the successive stages of the litigation. [Citations omitted.] So because the panel apparently waited until after the trial to dismiss some claims based on lack of standing, and the State has waited until the appeal to raise some standing arguments, the facts alleged to prove standing must be "'supported adequately by the evidence adduced at trial.'" [Citations omitted.] In these civil proceedings the preponderance of the evidence standard applies. [Citations omitted.] Under this standard the plaintiffs' evidence must show that "a fact is more probably true than not true." [Citations omitted.]

Gannon v. State, 298 Kan. at 1123–24 (emphasis added).

In a pre-discovery Motion to Dismiss based on claimed standing deficits in a petition, however, the Court must review the challenged petition and draw reasonable inferences from it. See *Bd. of Cnty. Commissioners of Sumner Cnty. v. Bremby*, 286 Kan. 745, 762, 189 P.3d 494 (2008). In such circumstances,

> [W]e accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom. If those facts and inferences demonstrate that the appellants have standing to sue, the decision of the district court must be reversed.

Bd. of Cnty. Commissioners of Sumner Cnty. v. Bremby, 286 Kan. at 751. The Kansas Supreme Court has further written that:

> [W]hen a motion to dismiss for lack of personal jurisdiction is decided

> before trial on the basis of pleadings, affidavits, and other written materials without an evidentiary hearing, any factual disputes must be resolved in the plaintiff's favor and the plaintiff need only make a prima facie showing of jurisdiction. Standing, of course, is a question of subject matter jurisdiction, but we see no basis for an analytical distinction in how an appellate court should review a district court's order on a motion to dismiss based on standing from one regarding personal jurisdiction.

Friends of Bethany Place, Inc. v. City of Topeka, 297 Kan. 1112, 1122, 307 P.3d 1255 (2013).

2. Ripeness

As with standing, ripeness is a required element for a case to be justiciable. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 891, 179 P.3d 366 (2008). As described by the Kansas Supreme Court:

> The doctrine of ripeness is "designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" [Citations omitted.] To be ripe, issues must have taken shape and be concrete rather than hypothetical and abstract. [Citations omitted.] Stated yet another way, the doctrine prevents courts from being "asked to decide 'ill-defined controversies over constitutional issues,' . . . or a case which is of 'a hypothetical or abstract character.' . . ." [Citations omitted.]

State ex rel. Morrison v. Sebelius, 285 Kan. at 892. While Kansas, not federal, law determines whether or not a case is justiciable, Kansas courts may look to federal law for guidance. *Gannon v. State*, 298 Kan. at 1119.

B. Motions to Dismiss for Failure to State a Claim

Kansas courts do not favor granting motions for failure to state a claim under K.S.A. 60-212(b)(6). *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001). In evaluating whether a petition has failed to state a claim, a court must determine whether the petition states any valid claim for relief when viewing the alleged facts in a light most favorable to the petitioner and resolving all doubts in the petitioner's favor. *State ex rel. Slusher v. City of Leavenworth*, 279

Kan. 789, 790, 112 P.3d 131 (2005). A district court reviewing such a motion, however, cannot resolve disputes of fact. *Rector v. Tatham*, 287 Kan. 230, 232, 196 P.3d 364 (2008). When considering a motion to dismiss for failure to state a claim,

> [A] court must accept the plaintiff's description of that which occurred, along with any inferences reasonably [to] be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself.

Halley, 271 Kan. at 656 (quoting *Ripley v. Tolbert*, 260 Kan. 491, 493, 921 P.2d 1210 (1996)).

Ultimately, dismissal is only appropriate when "the allegations of the petition clearly demonstrate petitioners do not have a claim." *Slusher*, 279 Kan. at 790. If, however, a party moving for dismissal under K.S.A. 60-212(b)(6) raises facts for the Court's consideration beyond the face of the pleading at issue, the Court must interpret the motion as one for summary judgment. *Brown v. Ford Storage & Moving Co.*, 43 Kan. App. 2d 304, 306–07, 224 P.3d 593 (2010).

II. MOTIONS FOR SUMMARY JUDGMENT

The Kansas rules regarding summary judgment are well known. A court may enter summary judgment "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Thoroughbred Associates, L.L.C. v. Kansas City Royalty Co., L.L.C.*, 297 Kan. 1193, 1204, 308 P.3d 1238 (2013) (quoting *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009)). Before granting summary judgment, a court must "resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought."

Thoroughbred Associates, 297 Kan. at 1204. To avoid summary judgment, the nonmoving party must present evidence to establish a dispute as to a material fact; the facts involved in this dispute "must be material to the conclusive issues in the case." 297 Kan. at 1204. In other words, the nonmoving party "cannot evade summary judgment on the mere hope that some thing may develop at trial." *Essmiller v. Southwestern Bell Tel. Co.*, 215 Kan. 74, 77, 524 P.2d 767 (1974).

Summary judgment must be denied, however, where reasonable minds could differ as to the conclusions drawn from the evidence. *Thoroughbred Associates*, 297 Kan. at 1204. That said, when the nonmoving party fails to

> [M]ake a showing sufficient to establish the existence of an element essential to that party's case . . . there can be 'no genuine issue as to any material fact,' because a 'complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'

Eudora Dev. Co. of Kansas v. City of Eudora, 276 Kan. 626, 631–32, 78 P.3d 437 (2003) (quoting the district court decision in the instant case) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

CONCLUSIONS OF LAW

I. MOTION TO DISMISS

As noted, this case comes before the Court as a declaratory judgment action. Accordingly, the Court first looks to K.S.A. 60-1701 *et seq.* for guidance as to the justiciability requirements of such a case. As that statute reads:

> Courts of record within their respective jurisdictions shall have power to declare the rights, status, and other legal relations whether or not further relief is, or could be sought. No action or proceeding shall be dismissed or stayed for the sole reason that only declaratory relief has been sought. The declaratory may be either affirmative or negative in nature; and such declarations shall have the force and effect of a final judgment.

K.S.A. 60-1701. K.S.A. 60-1704 governs the specific requirements of this action, and provides that:

> Any person having an interest under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may seek determination of any question of construction or validity arising under that enactment, document or agreement and may obtain a declaration of rights, status or other legal relations thereunder.

The Defendant brings two separate theories in support of the dismissal they seek. First, the Defendant claims that the matter is nonjusticiable, arguing that the Plaintiff lacks standing to challenge the constitutionality of § 11, and, second, that even if the Plaintiff does have standing, the matter is not yet ripe because the Plaintiff has not yet suffered any harm from § 11.

Next, and more generally, the State attacks the merits of the case, arguing that, as a matter of law, § 11 does not violate the separation of powers. Thus, the Defendant submits, the Petition fails to state a claim. The Court will address both claims before considering the Plaintiff's Cross-Motion for Summary Judgment.

A. Case or Controversy

1. Standing

The Defendant argues, first and foremost, that the Plaintiff lacks standing in this matter because he cannot show a cognizable injury resulting from the passage of § 11. The Defendant bases this argument off of the comments made in paragraph 3 of the Petition, which reads:

> As a member of the Kansas judiciary and the chief judge of his district, Judge Solomon has a direct interest in the integrity and viability of the Kansas unified court system as well as the Kansas Supreme Court's vital role in administering the various courts comprising that system, including the district court of the 30th Judicial District. As Chief Judge of one of the district courts directly impacted by H.B. 2338, plaintiff's status, and other legal relations, are directly affected by the legislation, and thus he has

> standing to seek a declaration of H.B. 2338's invalidity pursuant to K.S.A. § 60-1704.

Petition, at 2. The Defendant concedes, however, that,

> Admittedly, Chief Judge Solomon *might* be injured in a personal way *if* HB 2338 at some time in the future were to cause him to lose his position as chief judge. But at this point in time, such an injury is speculative at best, not "actual and imminent" as required for standing. To be actual and imminent, a threatened injury must be "*certainly impending*"—"allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted). Chief Judge Solomon's potential future loss of his position as chief judge does not meet this standard. In fact, it is entirely possible, perhaps probable, that he and his colleagues will vote that he continue as chief judge, particularly given the considerable experience he has gained in that position already. Indeed, rather than causing injury, it is plausible the change embodied in HB 2338 may *benefit* Chief Judge Solomon by eliminating any risk that the Supreme Court could decline to reappoint him at the end of a term.

Defendant's Memo. in Supp. of the Mot. to Dismiss, at 5.

In response, the Plaintiff argues that he suffered an injury in the form of altered "legal relations" with the Kansas Supreme Court and with his fellow judges of the 30th Judicial District—an injury which, he claims, occurred when § 11 became effective. Plaintiff's Memo. in Supp. of the Mot. for Summ. J., at 20. In support of his theory that changed "legal relations" are sufficient to grant standing, the Plaintiff cites to the concurring opinion of Judge Gibbons in the case of *Marchezak v. McKinley*, 607 F.2d 37, 42 (3d Cir. 1979). The Plaintiff claims that these altered relations grant him standing to challenge § 11. In the alternative, the Plaintiff argues that, even if his injury is "deemed not to occur until January 1, 2016," "the injury to his personal and particularized relationship with the Supreme Court is imminent enough to support standing" because "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 happened to establish standing." Plaintiff's Memo. in Supp. of the Mot. for Summ. J., at 23 (citing *Sierra Club v. Moser*, 298 Kan. 22, 41–42, 310 P.3d 360 (2013)).

The Defendant points out that the only authority the Plaintiff cites in support of its proposition that altered "legal relations" are sufficient to give a party standing is a concurring opinion in a 1979 3rd Circuit case, arguing that, if this was truly the test for standing, then surely "the plaintiff members of Congress would have had standing in *Raines v. Byrd*, 521 U.S. 811 (1997)." The Plaintiff replies, however, that *Raines* involved a claimed *institutional* injury—not a claimed personal injury, as is alleged in this case.

Kansas's standing requirement is grounded in the separation of powers doctrine, which is implicit in our state Constitution. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 896, 179 P.3d 366 (2008). As the Kansas Supreme Court has written:

> Generally, to have standing, *i.e.,* to have a right to make a legal claim or seek enforcement of a duty or right, a litigant must have a "sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy." [Citations omitted.] Under the traditional test for standing in Kansas, "'a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct.'" [Citations omitted.] We have also referred to the cognizable injury as an "'injury in fact.'" [Citations omitted.] And this court occasionally cites the federal rule's standing elements that "a party must present an injury that is concrete, particularized, and actual or imminent; the injury must be fairly traceable to the opposing party's challenged action; and the injury must be redressable by a favorable ruling." [Citations omitted.]
>
> As to standing's first element of establishing a cognizable injury, more particularly we have held that "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." [Citations omitted.] The injury must be particularized, *i.e.,* it must affect the plaintiff in a "'personal and individual way.'" [Citations omitted.] It cannot be a "'generalized grievance'" and must be more than "'merely a general interest common to all members of the public.' . . ." [Citations omitted.]

Gannon v. State, 298 Kan. at 1122–23. However, the Kansas Supreme Court has also described the standing requirement in declaratory judgment actions as "less rigorous[,]" though it has emphasized that "actual cases and controversies are still required." *Morrison*, 285 Kan. at 897. The Court further notes that the Kansas Declaratory Judgments Act "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). And Kansas courts have repeatedly recognized that "judicial power" is the "power to hear, consider and determine controversies between rival litigants." *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cnty./Kansas City, Kan.*, 264 Kan. 293, 337, 955 P.2d 1136 (1998).

In the present situation, there is undoubtedly "uncertainty" and "insecurity" with respect to the process governing selection and retention of chief judges across the state. While this process had, formerly, been governed by Kan. Sup. Ct. R. 107(a)(1), § 11 now poses a direct challenge to that process—a challenge that is not at all certain to be deemed constitutional under the separation of powers doctrine. Thus, 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. To the extent that the holder of a position has a right—whether created by statute or by supreme court rule—to have their performance in that position reviewed by a certain entity or to be selected *by* said entity, any alteration to that right would appear to constitute an "injury" within the liberal construction given to that terminology in the Kansas Declaratory Judgments Act.

The question, then, is whether an alteration in the right to a certain selection or review process is a sufficient "injury"—under the "less rigorous" justiciability requirements of a

declaratory judgment action—to confer standing upon the Plaintiff. This Court concluded as much in the recent case of *Kansas National Education Association v. State of Kansas*, Case No. 2014-CV-789, where, in determining that the individual teacher members of the plaintiff organization KNEA would have standing to sue, individually, the Court wrote:

> To the extent that school district teachers had once been included within the procedural protections found in the previous versions of these statutes . . . they can be said to have now *lost* those same protections as a direct result of [the challenged legislation]. No teacher has apparently yet been fired under the new version of these statutes, no dismissal notice yet sent out. Yet the loss to the school district teachers is the same either way. And in that loss—the loss of procedure, different from tenure only in scope—there is a concrete, actualized injury in fact.

Case No. 2014-CV-789, Memorandum Decision and Order of June 4, 2015, at 14 (writing the above in reference both to the ripeness of the matter and to the plaintiff's standing) (emphasis in original).

While that case is currently on appeal, the Court notes that the present case would appear to present a substantially similar situation. Thus, the Court adopts the reasoning it articulated in Case No. 2014-CV-789. Before the passage of § 11, chief judges were entitled to a certain process governing their appointment, review, and retention to that post. Whether or not the result as to the selection of a chief judge under the provisions of § 11 would differ from that under Kan. Sup. Ct. R. 107(a)(1) is immaterial because, in altering the process itself, the Legislature has conferred upon the Plaintiff a cognizable "injury" subject to adjudication under the Kansas Declaratory Judgments Act. Insofar 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 that he has standing to challenge the constitutionality of § 11.

By virtue of this determination, this Court need not address the Plaintiff's argument concerning his "personal and particularized relationship with the Supreme Court." Consequently, the Court need not consider either the Plaintiff's affidavit or the Defendant's request for additional discovery. No additional discovery is deemed necessary in order to evaluate the Plaintiff's standing.

2. Ripeness

The Defendant argues that, because the Plaintiff has not *yet* lost his job as Chief Judge, he cannot yet have suffered a cognizable harm. The Plaintiff, in reply, argues that his relationship with his fellow judges and with the Kansas Supreme Court was injured on the date of the enactment of § 11. Moreover, the Plaintiff argues that "the dispute over Section 11's constitutionality is sufficiently concrete to be ripe for adjudication at this time." Plaintiff's Reply Memo., at 10–11 (citing *State ex rel Morrison v. Sebelius*, 285 Kan. 875, 892, 179 P.3d 366 (2008).

The Court agrees with the Defendant's position that "A claim is not ripe if it rests on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Defendant's Memo. in Supp. of the Mot. to Dismiss, at 5. However, the Court also notes, again, the similarity between the Defendant's present argument as to ripeness and that which was raised in Case No. 2014-CV-789. As articulated above, the immediate "harm" stemming from § 11 is the loss of the right to a certain process governing the selection and retention of chief judges—not necessarily in the *actual* loss of a chief judgeship or, as the Plaintiff claims, the impairment of his "personal and particularized relationship with the Supreme Court." To 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.

Thus, the Court concludes that the Plaintiff has presented a justiciable case or controversy. The Court next addresses the Defendant's claim that the matter should be dismissed for failure to state a claim.

B. Failure to State a Claim

As a threshold matter, the Court notes that the Defendant's Motion to Dismiss for failure to state a claim encompasses matters beyond those contained in the Petition, including three separate exhibits which were attached to the Defendant's Memorandum in Support of the Motion to Dismiss. Thus, the Court must treat the Defendant's Motion as one for summary judgment. *Brown v. Ford Storage & Moving Co.*, 43 Kan. App. 2d at 306–07. Because the Court's decision ultimately turns on an interpretation of law—the material facts surrounding which are not in dispute—the Court will consider both the Plaintiff's Cross-Motion and the Defendant's Motion to Dismiss for failure to state a claim together.

II. MOTION FOR SUMMARY JUDGMENT

The Defendant's claim that the Plaintiff's Petition fails to state a claim does not proceed upon any affirmative defense or missing element within the Petition itself, but, rather, attacks the merits of the Petition. The attack is two-pronged: first, the Defendant argues, the case of *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1 (1983), does not require the invalidation of § 11 and, second, the Defendant argues that § 11 does not violate the separation of powers doctrine. In reply, the Plaintiff argues that *Mitchell* is binding and dispositive of the case, but even if *Mitchell* is merely persuasive, § 11 still violates the separation of powers doctrine and the provisions of Article 3, § 1 of the Kansas Constitution.

The Court will begin its analysis with a discussion of Article 3, § 1 and the separation of powers doctrine in Kansas before turning to the question of what effect, if any, the *Mitchell*

analysis has on the case at bar. Subsequently, the Court will consider whether, in light of the aforementioned principles, § 11 constitutes a "significant interference" with the Kansas Supreme Court's powers over the administration of the Judiciary.

A. The Interplay Between Article 3, § 1, and the Separation of Powers Doctrine

As of 1972, Article 3, § 1 of the Kansas Constitution provides:

> The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state.

The present case implicates the final sentence of this section, as this Court is asked to examine whether the appointment of chief judges falls under the penumbra of the Kansas Supreme Court's "general administrative authority over all courts in this state."

Previously, the Kansas Supreme Court has considered whether selection for a seat on the Supreme Court Nominating Commission fell under its "general administrative authority." *State ex rel. Stephan v. Adam*, 243 Kan. 619, 760 P.2d 683 (1988). As the court determined,

> [T]he Supreme Court Nominating Commission is an integral part of the process by which justices of the Kansas Supreme Court are selected and appointed. Individuals selected as justices become part of the court which is the final arbitrator of our state's constitution and laws. The selection and appointment process by which justices are chosen is a matter of statewide concern. Questions raised as to the legality of the composition of the Commission are of great public importance and deserve to be resolved with speed and finality. Since the Kansas Constitution provides the Supreme Court with the "general administrative authority over all courts in this state" . . ., the issues of this case go to the very heart of the administration of justice and the court system in Kansas.

State ex rel. Stephan v. Adam, 243 Kan. at 620–21. In a separate case, after reiterating the conclusion that "[T]he practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally

and logically belongs to the judicial department of the government[,]" the Kansas Supreme Court set forth the following analysis:

> **A statutory regulation governing the practice of law is effective only when it accords with the inherent power of the judiciary, because licensed attorneys are officers of the court.** [Citations omitted.] This court has nevertheless recognized the legitimate authority of the legislature to enact statutes that have direct or indirect effects on the practice of law; **when those statutes reinforce the objective of the judiciary.** For example, the legislative or executive branches may generate rules governing the appointment of attorneys for indigent defendants and for computing the compensation for those attorneys, [citations omitted], and the legislature may enact rules that preclude the appearance of attorneys to represent clients in certain causes of action, such as in small claims courts. [Citations omitted.]
>
> The purpose of the consumer protection laws in Kansas is protection of the public. [Citations omitted.] This intent is consistent with the Kansas Rules of Professional Conduct. [Citations omitted.] The KCPA harmonizes with the goals of this court when it regulates the practice of law, and the statute provides a private cause of action that supplements the regulatory power of this court.
>
> **Legislation that has an incidental impact on the practice of law and that does not conflict with the essential mission of regulating the practice of law in this state does not violate the separation of powers doctrine.**

Hays v. Ruther, 298 Kan. 402, 409–10, 313 P.3d 782 (2013) (emphasis added).

The separation of powers doctrine, however, although "not expressly stated in either the United States or Kansas Constitutions, . . . is recognized as 'an inherent and integral element of the republican form of government.'" *Hays v. Ruther*, 298 Kan. 402, 409, 313 P.3d 782 (2013) (internal quotation marks omitted). Moreover,

> The basic contours of the separation of powers doctrine are easily stated. Each of the three branches of our government—the legislative, judicial, and executive branches—is given the powers and functions appropriate to it. As the United States Supreme Court explained nearly 200 years ago: "The difference between the departments undoubtedly is,

> that the legislature makes, the executive executes, and the judiciary construes the law." [Citations omitted.]
>
> This statement, while accurate and straightforward, is deceptively simplistic because "separation of powers of government has never existed in pure form except in political theory." [Citations omitted.] In reality, there is an overlap and blending of functions, resulting in complementary activity by the different branches that makes absolute separation of powers impossible.

State ex rel. Morrison v. Sebelius, 285 Kan. 875, 883, 179 P.3d 366 (2008). The Kansas Supreme Court has provided "four general principles" to govern the analysis when the separation of powers doctrine is at issue:

> First, the separation of powers doctrine requires a court to presume a statute to be constitutional. [Citations omitted.] "A statute is presumed constitutional and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the court must do so." [Citations omitted.]
>
> Second, when considering if there has been a violation of the separation of powers doctrine, a court must examine the specific facts and circumstances presented and search for a usurpation by one branch of government of the powers of another branch of government. [Citations omitted.]
>
> Third, a usurpation of powers exists when there is a significant interference by one branch of government with the operations of another branch. [Citations omitted.]
>
> Fourth, a court determining whether there has been a significant interference by one branch of government should consider "(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." [Citations omitted.]

State ex rel. Morrison v. Sebelius, 285 Kan. 875, 883–84, 179 P.3d 366 (2008). Thus, not every intrusion by one branch upon the powers of another will necessarily render a statute unconstitutional. A statute's constitutionality is not, therefore, in danger of running afoul of the

separation of powers doctrine *except* when it rises to the level of a "significant interference" with the powers of another branch.

B. *State v. Mitchell* is Binding Law on this Court

Both parties agree that the Court's essential inquiry must be whether § 11 constitutes a "significant interference" with the Kansas Supreme Court's "general administrative authority" over the state Judiciary. They could not disagree more, however, on the outcome of this inquiry. As a threshold matter, however, both parties urge the Court to consider the *Mitchell* opinion in line with their own views of the case. The Court is specifically directed to the following portion of *Mitchell*:

> By the same token, the judiciary can acquiesce in legislative action in this area of the judicial function. The constitutional power over court administration and procedure remains vested in the judicial branch even though legislation is used to help perform its function. Problems arise only when court rules and a statute conflict. Under such circumstances, the court's constitutional mandate must prevail.

State v. Mitchell, 234 Kan. at 195.

The length and thoroughness of each party's discussion of *Mitchell* reveals the importance of that case to the analysis in this matter at hand. The Defendant argues that the final sentence of this paragraph is "both dictum and inaccurate as a matter of law." Defendant's Memo. in Supp., at 6. The Defendant further suggests that, "Plaintiff's reading of *Mitchell* would give the Kansas Supreme Court a veto over an entire category of legislation, *i.e.*, laws implicating judicial administration and procedure, a proposition found nowhere in the text or structure of the Constitution or in the practices or holdings of the Kansas Supreme Court." Defendant's Memo. in Supp., at 8. The Plaintiff, meanwhile, argues 1) that *Mitchell* is binding precedent and is determinative of the issues in this case, 2) that, even if dictum, the *Mitchell*

analysis is persuasive, and 3) that the Defendant's arguments as to why *Mitchell* "cannot be the law" are unavailing. Plaintiff's Memo. in Supp. of the Mot. for Summ. J., at 10–20.

In *Mitchell*, the court considered whether the then-extant version of K.S.A. 22-3411a violated the separation of powers doctrine and Article III, Sec. 1, of the Kansas Constitution. K.S.A. 22-3411a, as it then existed, read:

> In all felony trials, upon the request of either the prosecution or the defendant, the court shall cause enough jurors to be called, examined, and passed for cause before any peremptory challenges are required, so that there will remain sufficient jurors, after the number of peremptory challenges allowed by law for the case on trial shall have been exhausted, to enable the court to cause 12 jurors to be sworn to try the case.

The trial court did not follow this method of jury selection. *Mitchell*, 234 Kan. at 192. When the court's choice of procedure was challenged under K.S.A. 22-3411a, the trial court ruled that the enactment of the statute violated the separation of powers doctrine. 234 Kan. at 193.

Upon appeal to the Kansas Supreme Court, the issue was framed as "whether the Supreme Court has exclusive constitutional power to make rules pertaining to court administration and procedure." 234 Kan. at 193. The resolution of this question necessitated the court to consider the specific contours of the powers assigned to it by Article III, Sec. 1, which the court considered to fall "into two categories: the traditional, independent decision-making power and the rulemaking authority over administration and procedure." 234 Kan. at 195. More specifically, the court noted that:

> The power to make decisions cannot be delegated to a nonjudicial body or person, even with the consent of the litigants. [Citations omitted.] On the other hand, the court's power over court administration and procedure can be performed in cooperation with the other branches of government through the use of agreed-upon legislation without violating the separation of powers doctrine. Examples are the Code of Civil Procedure, K.S.A. 60-101 *et seq.* and the Code of Criminal Procedure, K.S.A. 22-2101 *et seq.*

> By the same token, the judiciary can acquiesce in legislative action in this area of the judicial function. The constitutional power over court administration and procedure remains vested in the judicial branch even though legislation is used to help perform its function. Problems arise only when court rules and a statute conflict. Under such circumstances, the court's constitutional mandate must prevail.

234 Kan. at 195. After setting forth this analysis, the supreme court concluded that no conflict existed between legislation and court rules in *Mitchell* because there *were* no court rules relating to the exercise of peremptory challenges to a jury. 234 Kan. at 195. The trial court's failure to follow K.S.A. 22-3411a, then, was deemed to be erroneous, but harmless to the rights of the appellant. 234 Kan. at 195–96.

Thus, *Mitchell* presents a situation where, in order to address the trial court's conclusions, a consideration of the interplay between the legislative and judicial branches of government was necessary. Even though the Kansas Supreme Court ultimately determined that no conflict existed between the applicable court rules and legislation in *Mitchell*, it was essential to the court's decision to set forth the analytical framework above, to which the Defendant objects as mere dicta. Thus, *Mitchell* would appear to be binding precedential authority for this Court's decision in *this* case.

However, because subsequent Kansas Supreme Court cases have expanded on the separation of powers analysis which this Court must apply, *Mitchell* is only the beginning of the Court's inquiry—not the end. Read in light of subsequent cases, it would appear that *Mitchell*'s ultimate contribution to the separation of powers analysis is merely the conclusion that the Legislature does *not* enjoy supreme power over areas of court administration. Moreover, the Court sees nothing unreasonable in *Mitchell*'s conclusion that "the judiciary can acquiesce in legislative action in [the area of court administration and procedure]." 234 Kan. at 195. As the

Mitchell court made clear, both the Code of Civil Procedure and the Code of Criminal Procedure constitute but a few examples of such acquiescence.

However, should the Legislature choose to enact legislation that purports to alter an administrative procedure or rule previously propounded by the Kansas Supreme Court—as it has done with the passage of § 11—the Court must consider whether this legislative intrusion constitutes a "significant interference" with the exercise of the Kansas Supreme Court's constitutional "general administrative authority." *Mitchell*—read in light of subsequent case law—mandates that such legislation must be deemed null and void as a violation of the separation of powers *if* it constitutes a significant interference with the supreme court's general administrative authority.

C. § 11 Constitutes a Significant Interference with the Kansas Supreme Court's Powers Over the Administration of the Judiciary

The Court recognizes and acknowledges that the statute in question must be presumed to be constitutional and all doubts must be resolved in favor of its validity. With that in mind, the Court will consider the specific facts and circumstances presented to determine if a usurpation or significant interference has occurred by the Legislature over the Judiciary. As set forth by *State ex rel. Morrison v. Sebelius*, four factors must be examined to determine "whether there has been a significant interference by one branch of government": "(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." 285 Kan. at 884 (internal quotation marks omitted). The Court will consider each in turn.

1. Essential Nature of the Power Being Exercised

The Defendant argues that the power at issue here is fundamentally legislative, claiming, "The grant of administrative authority to the Supreme Court does not strip the Legislature of its authority to regulate the court system." Defendant's Memo. in Supp. of the Mot. to Dismiss, at 10. The Defendant argues that the Legislature's authority is especially applicable to the "selection of judicial officers," and calls this Court's attention to the case of *Leek v. Theis*, 217 Kan. 784, 539 P.2d 304 (1975). Defendant's Memo. in Supp. of the Mot. to Dismiss, at 10. The Defendant points to the example of the Kansas Court of Appeals, which was created pursuant to legislation, and to the original legislative creation of the position of chief district court judge. ." Defendant's Memo. in Supp. of the Mot. to Dismiss, at 11. The Defendant further argues that "[I]t is important to distinguish between *administrative* authority and *legislative* power to govern administration." Defendant's Memo. in Supp. of the Mot. to Dismiss, at 12. The Plaintiff, in contrast, suggests that the nature of the power here being exercised is fundamentally one of court administration.

At its most basic level, § 11 purports to strip the Kansas Supreme Court of its power to appoint chief judges. In order to resolve the parties' fundamental disagreement about the nature of the power at issue here, it is necessary to examine just what, exactly, a chief district court judge does in Kansas.

The position of chief district court judge, interestingly enough originally called "administrative" judge, was created by statute in 1968. See Laws 1968, ch. 385, § 34. As originally enacted, K.S.A. 20-329 read:

> In every judicial district having more than one division, the supreme court may designate an administrative judge who shall have general control over the assignment of cases within said district subject to supervision by the supreme court.

K.S.A. 1968 Supp. 20-329. This statute was passed prior to the amendment of Article III, Sec. 1 of the Kansas Constitution, which granted "general administrative authority" to the Kansas Supreme Court. Subsequent amendments to K.S.A. 20-329 over the years changed the nature of the position little. See Laws 1976, ch. 146, § 28[1]; Laws 1980, ch. 94, § 5[2]; Laws 1986, ch. 115, § 36[3]; Laws 1999, ch. 57, § 17[4].

The Kansas Supreme Court, however, has clearly outlined the powers and duties of a chief district court judge:

> **(b) Chief Judge's Duties and Powers.** The chief judge's duties and administrative powers include:
>
> (1) *Clerical and Administrative Functions.* The chief judge is responsible for and has supervisory authority over the court's clerical and administrative functions.
>
> (2) *Personnel Matters.*
>
> (A) General Responsibility. The chief judge is responsible for and has supervisory authority over recruitment, removal, compensation, and training of the court's nonjudicial employees.
>
> (B) Appointment of Clerk and Chief Clerk. The chief judge must appoint a clerk of the district court for each county in the judicial district and appoint one clerk of the district

[1] "In every judicial district the supreme court shall designate a district judge as administrative judge who shall have general control over the assignment of cases within said district, subject to supervision by the supreme court. Within guidelines established by statute, rule of the supreme court or the district court, the administrative judge of each district court shall be responsible for and have general supervisory authority over the clerical and administrative functions of such court."

[2] "In every judicial district the supreme court shall designate a district judge or associate district judge as administrative judge who shall have general control over the assignment of cases within the district, subject to supervision by the supreme court. Within guidelines established by statute, rule of the supreme court or the district court, the administrative judge of each district court shall be responsible for and have general supervisory authority over the clerical and administrative functions of such court."

[3] Removing the phrase "associate district judge" from the statute, but, otherwise, leaving it unchanged.

[4] Renaming the position of "administrative" judge to "chief" judge.

court to be chief clerk of the district, except that a chief clerk is not required to be designated in a judicial district which is authorized to have a court administrator. On appointment:

(i) a copy of each order of appointment must be sent to the judicial administrator; and

(ii) the clerk or chief clerk appointed under this subparagraph must subscribe to an oath or affirmation under K.S.A. 54-106.

(3) *District Court Case Assignment.* Under the supervision of the Supreme Court, the chief judge is responsible for case assignment. The following guidelines apply:

(A) To the extent reasonably possible, the chief judge must distribute the district's judicial work equally.

(B) The chief judge should reassign cases when necessary.

(C) The chief judge is responsible for assigning cases to the court's special divisions, if any.

(4) *Judge Assignment.*

(A) Subject to approval by a majority of the other judges, the chief judge must:

(i) assign judges to the court's special divisions, if any; and

(ii) prepare an orderly vacation plan that is consistent with statewide guidelines.

(B) Subject to the departmental justice's approval, the chief judge may appoint another judge of the district to act *pro tem* in the chief judge's absence.

(C) A judge must accept an assigned case unless the judge is disqualified or the interests of justice require the judge's recusal.

(5) *Information Compilation.* The chief judge is responsible for developing and coordinating statistical and management information.

(6) *Fiscal Matters.* The chief judge must supervise the court's fiscal affairs.

(A) Designation of Fiscal Officer. The chief judge must designate a fiscal officer for each county in the judicial district to assist in managing the court's budget. The chief judge may designate a clerk of the district court or court administrator as fiscal officer. In multicounty districts, the same person may serve as fiscal officer for one or more counties.

(B) Fiscal Officer's Duties. The fiscal officer in each county must:

(i) under the supervision of the chief judge, initiate expenditures from the court's budget and process expenditures for the operation of all court offices within the county;

(ii) maintain accounts on all budgetary matters; and

(iii) regularly report to the chief judge on the status of the court's budget.

(C) Preparation of County Operating Budget; Copies. In preparing and submitting a district court county operating budget, the chief judge—or a fiscal officer under supervision of the chief judge—must:

(i) use forms prescribed by the judicial administrator;

(ii) follow in detail the district court county operating budget guidelines distributed by the office of judicial administration;

(iii) forward to the judicial administrator a copy of the budget at the time the budget is submitted to the board of county commissioners; and

> (iv) not later than August 25, forward to the judicial administrator a second copy of the budget, signed by the presiding officer of the county commission indicating approval of the budget as submitted or as amended.
>
> (7) *Committees*. The chief judge may appoint standing and special committees necessary to perform the court's duties.
>
> (8) *District Judicial Meetings*. At least once each month in a single-county district and at least once every three months in a multicounty district, the chief judge must call a meeting of all judges of the district court to review the district's dockets and to discuss other business affecting the court's efficient operation.
>
> (9) *Liaison and Public Relations*. The chief judge represents the court in business, administrative, and public relations matters. When appropriate, the chief judge should meet with—or designate other judges to meet with—bench, bar, and news media committees to review problems and promote understanding.
>
> (10) *Improvement in the Court's Functioning*. The chief judge must evaluate the court's effectiveness in administering justice and recommend changes.

Kan. Sup. Ct. R. 107(b) (2014 Kan. Ct. R. Annot. 217–20).

As is apparent from both the original title of the chief district court judge position and from the powers and duties assigned to chief district court judges, there is little doubt that the fundamental nature of the position is administrative. Put another way, 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. Moreover, although the position was created by statute, K.S.A. 20-329 was passed *before* the constitutional amendment to Article III, Sec. 1—in other words, before the grant of "general administrative authority" to the supreme court was made explicit.

The Defendant also attempts to draw a connection between the constitutional power of the Governor, codified at Article I, Sec. 3 of the Kansas Constitution, and that of the Kansas Supreme Court. Defendant's Memo. in Supp. of the Mot. to Dismiss, at 11–12. The Defendant suggests that "The Governor has general administrative authority over most Executive Branch agencies" but admits that "the language in the Constitution is 'supreme executive power.'" Defendant's Memo. in Supp. of the Mot. to Dismiss, at 11. However, the only appearance of the word "administration"—or any of its root stems—in Article I of the Kansas Constitution occurs at Article I, Sec. 6, which provides:

> (a) For the purpose of transferring, abolishing, consolidating or coordinating the whole or any part of any state agency, or the functions thereof, within the executive branch of state government, when the **governor considers the same necessary for efficient administration**, he may issue one or more executive reorganization orders, each bearing an identifying number, and transmit the same to the legislature within the first thirty calendar days of any regular session. Agencies and functions of the legislative and judicial branches, and constitutionally delegated functions of state officers and state boards shall be exempt from executive reorganization orders.
>
> (b) The governor shall transmit each executive reorganization order to both houses of the legislature on the same day, and each such order shall be accompanied by a governor's message which shall specify with respect to each abolition of a function included in the order the statutory authority for the exercise of the function. Every executive reorganization order shall provide for the transfer or other disposition of the records, property and personnel affected by the order. Every executive reorganization order shall provide for all necessary transfers of unexpended balances of appropriations of agencies affected by such order, and such changes in responsibility for and handling of special funds as may be necessary to accomplish the purpose of such order. Transferred balances of appropriations may be used only for the purposes for which the appropriation was originally made.
>
> (c) Each executive reorganization order transmitted to the legislature as provided in this section shall take effect and have the force of general law on the July 1 following its transmittal to the legislature, unless within sixty calendar days and before the adjournment of the legislative session either

> the senate or the house of representatives adopts by a majority vote of the members elected thereto a resolution disapproving such executive reorganization order. Under the provisions of an executive reorganization order a portion of the order may be effective at a time later than the date on which the order is otherwise effective.
>
> (d) An executive reorganization order which is effective shall be published as and with the acts of the legislature and the statutes of the state. Any executive reorganization order which is or is to become effective may be amended or repealed as statutes of the state are amended or repealed.

(Emphasis added).

It does not appear, therefore, that the Kansas Constitution vests the Governor explicitly with "general administrative authority" in the same way that the Kansas Supreme Court is granted said authority. As the Kansas Supreme Court has said of "supreme executive power":

> We do not find that the meaning of the phrase, "The supreme executive power," as contained in our constitution and the constitutions of many other states of this Union, has ever been precisely defined, although the matter is referred to in some decisions. Perhaps the term itself taken in connection with the context is sufficiently explicit. An executive department is created consisting of a Governor and the other officers named, and he is designated as the one having the supreme executive power, that is, the highest in authority in that department. In the same connection it will be noticed that the other executive officers are required to furnish information upon subjects relating to their duties, and to make annual reports to him, and withal he is charged with the duty of seeing that the laws are faithfully executed. It is manifest from these various provisions that the term "supreme executive power" is something more than a verbal adornment of the office, and implies such power as will secure an efficient execution of the laws, which is the peculiar province of that department, to be accomplished however in the manner and by the methods and within the limitations prescribed by the constitution and statutes enacted in harmony with that instrument.
>
> "When a Constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one, or the performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one. And it is further modified by another rule, that, where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient." [Citations omitted.]

State v. Dawson, 86 Kan. 180, 188–89 119 P. 360 (1911). Moreover, the supreme court has previously held that, "The governor was granted executive power by the provisions of Art. 1, but such grant did not include exclusive, general appointing power. Nothing in the executive article expressly grants the governor appointive power." *Leek v. Theis*, 217 Kan. at 803 (concluding that Article II, Sec. 1, and Article XV, Sec. 1 of the Kansas Constitution granted the Legislature the power to choose how "officers" were selected when said selection was not otherwise provided for in the constitution).

Thus, while the administrative authority contained in the "supreme executive power" may be implicit, the Kansas Supreme Court has been given constitutionally *explicit* "general administrative authority." This distinction renders the Defendant's comparison to the relationship between the Executive and Legislative branches of government unavailing. Moreover, the Court cannot agree with the Defendant's position that chief district court judges are "officers" within the meaning of Article II, Sec. 18, and Article XV, Sec. 1 of the Kansas Constitution. As the Plaintiff notes, Article III, Sec. 6 already controls for the selection of district court judges. The Court is unable to conclude that the position of chief district court judge—which, based on the legislative history of the position and the nature of the powers wielded by its holders, is entirely an administrative role—constitutes a separate "office" from that of a district court judge.[5]

[5] Admittedly, this conclusion is thrown into question by the fact that, under Article III, Sec. 2 of the Kansas Constitution, the chief justice of the supreme court is a quasi-separate office from that of other justices. Critically:

> . . .The justice who is senior in continuous term of service shall be chief justice, and in case two or more have continuously served during the same period the senior in age of these shall be chief justice. A justice may decline or resign from the office of chief justice without resigning from the court. Upon such declination or resignation, the justice who is next senior in continuous term of service shall become chief justice. During incapacity of a chief justice, the duties, powers and emoluments of the office shall devolve upon the justice who is next senior in continuous service.

Accordingly, the Legislature's powers under Article II, Sec. 18, and Article XV, Sec. 1 of the Kansas Constitution do not affect the Court's inquiry.

The Court concludes that the selection of a chief district court 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"—notwithstanding the fact that Article III, Sec. 15 of the Kansas Constitution and the remaining language of K.S.A. 20-329 still subject chief judges to discipline, suspension, and removal for cause by the supreme court. Accordingly, the first factor in the separation of powers inquiry weighs against the Defendant.

2. *Degree of Control Exercised by the Legislature Over the Judiciary Under § 11*

In order to determine the degree of control exercised by the Legislature over the Judiciary in the passage of § 11, it is necessary to consider the nature of chief district court judges. See, *e.g.*, *State v. Beard*, 274 Kan. 181, 190, 49 P.3d 492 (2002) (nature of the community corrections must be considered in determining whether a statute governing community corrections violated the separation of powers doctrine). The Court has already determined that the position of chief

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However, the function of the chief justice of the state supreme court is radically different from that of the chief judge of a district court, which, as noted, is a purely administrative office.

district court judge is fundamentally entwined with the Kansas Supreme Court's constitutionally-granted general administrative authority.

The Defendant argues that § 11 does not grant the Legislature control over the selection of a chief district court judge, but, rather, "simply modifies who *within the judicial branch* chooses chief judges[.]" Defendant's Reply Memo., at 10. While true on its face, this argument misses the point of the inquiry. In 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.

The Court notes that § 11 left intact the language of K.S.A. 20-329 that subjects a chief district court judge "to supervision by the supreme court"—although this authority is not legislatively-granted, but, rather, constitutionally provided for by Article III, Sec. 15 of the Kansas Constitution. Specifically, "[J]udges shall be subject to retirement for incapacity, and to discipline, suspension and removal for cause by the supreme court after appropriate hearing." Kan. Const. Art. III, Sec. 15. This is, however, beside the point. There may be myriad reasons for choosing—or not choosing—a particular candidate to serve as chief district court judge. Many of these reasons may not necessarily rise to the level of discipline, suspension, or removal for cause. The point is that a chief district court judge is an instrument through which the supreme court wields its general administrative authority. Without 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. See, *e.g.*, *Behrmann v. Pub. Emp. Relations Bd.*, 225 Kan. 435, 441, 591 P.2d 173 (1979).

Accordingly, it is immaterial that the Legislature has not granted itself the power to directly choose a chief district court judge. The Legislature *has* taken that power away from the Kansas Supreme Court and, thus, exerted itself over a fundamental component of the Judiciary. This factor, then, also weighs against the Defendant.

3. The Objective Sought by § 11

The Defendant argues that this factor is "perhaps the least important" inquiry into whether or not a violation of the separation of powers has occurred because "a bill that significantly interferes with the Kansas Supreme Court's administrative authority surely cannot be salvaged by a worthy motive, or vice versa." Defendant's Memo. in Supp. of the Mot. to Dismiss, at 13. Nevertheless, the Defendant contends, § 11 was passed "in part because of the practice in other states." Defendant's Memo. in Supp. of the Mot. to Dismiss, at 13. The Plaintiff agrees that this inquiry is not especially important, but argues that 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." Plaintiff's Memo. in Supp. of the Mot. for Summ. J., at 18–19.

The Court also affords little weight to this element of the analysis. However, while it is correct to suggest that "a bill that significantly interferes with the Kansas Supreme Court's administrative authority surely cannot be salvaged by a worthy motive, or vice versa[,]" that is not the nature of this inquiry. On the contrary, the legislative objective sought by § 11 is one element to be considered in determining whether there has *been* a significant interference in the first place, and it should not be ignored.

Viewed in isolation, § 11 may well represent a proper legislative purpose. However, the Plaintiff urges this Court to view that conclusion as belied by the passage of 2015 House Bill

2005, which has been drawn to this Court's attention by the Defendant. 2015 House Bill 2005 contains appropriations for the Judiciary for fiscal years 2016 and 2017, and as stated by of the bill:

> If any provision of . . . 2014 Senate Substitute for House Bill No. 2338 . . . 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.

Thus, as summarized by the Defendant, "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." Defendant's Reply Memo., at 1–2. The Plaintiff characterizes this as "unprecedented" and a "naked act of intimidation" that threatens "the public's confidence in a fair and impartial judiciary." Plaintiff's Reply Memo., at 1.

When viewed together with § 29 of 2015 House Bill 2005, legitimate questions could be raised about the legislative purpose behind § 11. To strip the power to choose chief district court judges away from the Kansas Supreme Court is one thing; whether or not it constitutes a significant interference with the Judiciary, it may have been explained away, in isolation, with facially permissible legislative objectives. The Plaintiff would suggest that the Legislature has doubled down on this intrusion, however, by threatening to wield the power of the purse as a club against an equal branch of government if its initial intrusion—*i.e.* § 11—is deemed unconstitutional. This, at least, calls into question any presumption the Court might otherwise give to the legislative motive at work in § 11. Without resolving this troubling set of circumstances, the Court concludes that this factor, too, weighs equally in favor of the Defendant and the Plaintiff,.

4. The Practical Result of the Blending of Powers As Shown by Actual Experience Over a Period of Time

The final consideration as to whether or not § 11 violates the separation of powers doctrine is the practical result of the blending of powers, as shown by actual experience over a period of time. The Defendant argues that peer selection has been the *de facto* policy in both Johnson and Sedgwick counties for some time. Defendant's Memo. in Supp. of the Mot. to Dismiss, at 14. Moreover, the Defendant argues, the practical experience in the surrounding states—many of which have constitutional delegations of constitutional authority similar to Article III, Sec. 1—supports the view that peer selection does not constitute a significant interference with a state supreme court's administrative authority. Defendant's Memo. in Supp. of the Mot. to Dismiss, at 15. However, as the Plaintiff points out, the Defendant offers no evidence that the legislatures of these surrounding states adopted peer selection of chief district court judges "in the teeth of a Supreme Court rule[.]" Plaintiff's Memo. in Supp. of the Mot. for Summ. J., at 19.

This point is important. While the judicial branches of other states and the federal government may have acquiesced to legislative interference with the selection of chief district court judges, the Judiciary of this state has not. And while it is true that the practical effect of the admixture of powers in those other jurisdictions has not, apparently, been harmful to the judiciaries thereof, that, in and of itself, does not outweigh the significance of the intrusion upon the *Kansas* Judiciary.

Accordingly, while this factor may sway in favor of the Defendant, all other factors in the separation of powers analysis fall squarely against or are equal in the consideration of the constitutionality of § 11—even when viewed in light of the presumption of validity which this

Court must accord legislative enactments. The Court, therefore, rules that § 11 of 2014 Senate Substitute for House Bill 2338 violates the separation of powers doctrine in Kansas and is, thus, unconstitutional. This also necessitates the invalidation of the remainder of 2014 Senate Substitute for House Bill 2338 by virtue of the nonseverability provision contained in § 43 of that bill, as agreed by both parties. See Defendant's Memo. in Supp. of the Mot. to Dismiss, at 2. Because there are no disputed material facts as to this analysis, the Court further grants the remainder of the Plaintiff's Motion for Summary Judgment. Moreover, because the effect this decision will have on § 29 of 2015 House Bill 2005 exceeds the scope of this Memorandum Decision and Order, the Court declines to address it.

One final point must be addressed. At oral arguments, the parties vigorously debated the extent to which one branch of government could "acquiesce" to an intrusion into its sphere of powers by another branch. The Defendant, in particular, took issue with the following comments from the *Mitchell* case:

> By the same token, the judiciary can acquiesce in legislative action in this area of the judicial function. The constitutional power over court administration and procedure remains vested in the judicial branch even though legislation is used to help perform its function. Problems arise only when court rules and a statute conflict. Under such circumstances, the court's constitutional mandate must prevail.

State v. Mitchell, 234 Kan. at 195. The Defendant failed to acknowledge the comments of the Supreme Court preceding this paragraph in *Mitchell*, which are:

> The power to make decisions cannot be delegated to a non-judicial Body or person, even with the consent of the litigants. [Citations omitted.] On the other hand, the Court's power over the court administration and Procedure can be performed in **cooperation** with the other branches of Government through the use of agreed-upon legislation without violating The separation of powers doctrine. [Emphasis added].

234 Kan. at 195. This court would substitute the word cooperation for the word acquiesce. The word cooperation is one too infrequently used in this court's opinion between the branches of government.

However, it appears to this Court that one branch of government's "cooperation with" or "acquiescence" to a minor intrusion by another branch is an essential prerequisite for the consideration of "the practical result of the blending of powers as shown by actual experience over a period of time"; how else could there *be* evidence of "actual experience over a period of time" if one branch had not, to one extent or another, acquiesced to said admixture? *State ex rel. Morrison v. Sebelius*, 285 Kan. at 884. To conclude otherwise would render all such intrusions, minor or otherwise, automatically verboten—a result that would likely make both litigators' and law students' lives easier by reducing the theoretical complexity of the doctrine, but which would also have the rather undesirable effect of felling the very viability of this great democracy and its form of government..

It is right and proper that our usual parlance—including the words of this Memorandum Decision and Order—refers to the legislative, executive, and judicial departments of government as "branches." Each is largely independent in executing its constitutionally mandated duties. But what is all too frequently lost in the metaphor, without going too far out on a limb, is that branches must, ultimately, remain connected with one another on some level in order to survive and thrive. A sundered branch is a dead branch, lifeless and ineffective. In the view of this Court, our state Constitution is not so inflexible—or so wooden.

CONCLUSION

For the reasons stated above, the Court DENIES the Defendant's Motion to Dismiss. The Court GRANTS the Plaintiff's Motion for Summary Judgment, finding § 11 of 2014 Senate Substitute for House Bill 2338 unconstitutional as a violation of the separation of powers doctrine of the Kansas Constitution. The parties are to bear their own costs. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further journal entry is required.

IT IS SO ORDERED.

Dated this 2nd day of September, 2015.

Hon. Larry D. Hendricks
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing **MEMORANDUM DECISION AND ORDER** was mailed, hand delivered, or placed in the pick-up bin this 2nd day of September, 2015, to the following:

Pedro L. Irigonegaray
Elizabeth R. Herbert
1535 SW 29th St.
Topeka, KS 66611

Randolph S. Sherman
Kaye Scholer, LLP
250 West 55th Street
New York, NY 10019

Matthew Menendez
Brennan Center for Justice
161 Ave. of the Americas, 12th Floor
New York, NY 10013
Attorneys for Plaintiff

Jeffrey A. Chanay
Chief Deputy Attorney General
Stephen R. McAllister
Solicitor General of Kansas
Dwight R. Carswell
Assistant Solicitor General
Memorial Bldg., 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1597
Attorneys for Defendant

Carol DeLong
Administrative Assistant