IN THE SUPREME COURT OF THE STATE OF KANSAS

BUTLER, KRISTIN, and
BOZARTH, SCOTT,
Plaintiffs,

v.

SHAWNEE MISSION SCHOOL
DISTRICT BOARD OF EDUCATION,
Defendant/Appellee.

KANSAS ATTORNEY GENERAL
DEREK SCHMIDT,
Intervenor/Appellant.

Case No. 124205

MOTION FOR A STAY PENDING APPEAL

Introduction

Kansas Attorney General Derek Schmidt moves for a stay of the district court's July 15, 2021, order declaring 2021 Senate Bill 40 unenforceable.

The district court *sua sponte* raised nonjurisdictional constitutional issues in a case in which it had already determined the issues between the parties. The court then ruled on those constitutional issues, even though the legal provisions at issue had expired by their own terms, thus rendering the matter moot. Ultimately, the court found portions of SB 40 unconstitutional, but declared the entire bill "unenforceable."

The district court's actions—a self-initiated constitutional controversy over moot questions resulting in a dramatically overbroad decision—were entirely improper. And they have combined to create unnecessary and disruptive confusion about the state of the Kansas Emergency Management Act, K.S.A. 48-920, *et seq*.

Accordingly, this Court should stay the district court decision pending the outcome of this appeal.

Factual and Procedural Background

This case originally was commenced by Plaintiffs Kristen Butler and Scott Bozarth as the parents of children who attend schools in the Shawnee Mission School District. Butler and Bozarth invoked new procedures enacted by the Kansas Legislature in SB 40 only a few months earlier to seek review of the mask policy imposed by the school district in connection with the COVID-19 health emergency. Among other things, SB 40 provides procedures for those "aggrieved" by a school board policy to receive a hearing before the school board and file a civil action in district court.

In an order denying relief to the plaintiffs, the district court *sua sponte* raised questions about the constitutionality of SB 40, and invited the intervention of the Attorney General to defend the constitutionality of the law. Order on Plaintiffs' Senate Bill 40 Request for Relief with Notice to the Attorney General (June 8, 2021) (attached as Exhibit A). The Attorney General subsequently intervened and filed a submission arguing that the matter was moot because of the expiration of the state of emergency, as well as defending the constitutionality of the law.

On July 15, 2021, the district court issued a "Judgment and Final Order After Intervention by the Kansas Attorney General" (attached as Exhibit B), in which it again dismissed the matter as to the plaintiffs, but the court also declared SB 40 unconstitutional and "unenforceable." According to the district court, "SB 40 is unenforceable through its enforcement provisions because it violates the separation of powers and it deprives the defendant of required due process." *Id.* at 27.

The Attorney General filed a notice of appeal on July 21. The district court subsequently denied a motion by the Attorney General to stay its decision pending appeal. Order Denying Request for Stay (July 27, 2021) (attached as Exhibit C).

Argument

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its own docket." *Henry v. Stewart*, 203 Kan. 289, 292, 454 P.2d 7 (1969) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). Additionally, K.S.A. 60-262(e) provides that this Court may grant a "stay on an appeal by the state, its officers or its agencies," without "requir[ing] a bond, obligation or other security." And K.S.A. 60-262(f) likewise reaffirms the inherent "power" of the appellate courts to "stay proceedings."

A stay is necessary here for multiple reasons. *First*, the district court's dramatic constitutional holding comes in a case with overwhelming obstacles of justiciability and mootness. *Second*, the decision is so overbroad that it purportedly nullified important provisions of SB 40 that have nothing to do with the supposed

constitutional violations, creating confusion about the state of the law and calling into question the ability of the State to respond to new emergencies. And *third*, a stay will not harm the Shawnee Mission School District because it does not currently suffer any injury as a result of SB 40.

1. In deciding the constitutional issues that it raised in this case, the district court trampled over multiple legal principles that restrain the power of courts to reach out and decide issues that are not properly before them. As an initial matter, the court itself raised the constitutional questions, and actually did so in an order in which it denied relief to the plaintiffs "as being moot and untimely." Ex. A at 20. Indeed, the court outright admitted that it was raising the constitutional issues "*sua sponte*." *Id.* at 14 n.12.

It is fundamentally improper for a district court to *sua sponte* raise non-jurisdictional constitutional issues. *Frontier Ditch Co. v. Chief Engineer of Div. of Water Resources*, 237 Kan. 857, 864, 704 P.2d 12 (1985) ("While the court may raise issues on its own motions, it is limited to issues of jurisdiction."); *City of Wichita v. Trotter*, ____ Kan. App. 2d ___, 2021 WL 3020731, at *7 (Kan. App. July 16, 2021) (noting "the district court's errant decision to *sua sponte* raise" a constitutional question); *Huffmier v. Hamilton*, 30 Kan. App. 2d 1163, 1166, 57 P.3d 819 (2002) (holding that "[i]t is error for a trial court to raise, *sua sponte*, nonjurisdictional issues"); *see also State ex rel. Schmidt v. City of Wichita,* 303 Kan. 650, 659, 367 P.3d 282 (2016) (holding that "Kansas courts do not issue advisory opinions"). In raising constitutional issues *sua sponte*, the district court here abandoned its role as

a neutral decisionmaker and became an advocate for its own claims. Indeed, at one point in responding to the Attorney General's standing argument, the district court remarkably stated that *the court* had standing, Ex. B at 15, thus effectively assuming the role of a party to the case. For this reason alone, the district court decision should be stayed.

But the district court's not-so-subtle activism did not stop there. The issues the court sought to reach had been rendered moot by the expiration of the pertinent section of SB 40. Yet the court charged forward with its constitutional agenda notwithstanding that it had already "denie[d] the plaintiffs any relief as being moot and untimely." Ex. A at 20. Similarly, the Shawnee Mission School District had informed the court "that Section 1 of SB 40 has expired." Ex. A at 12. The district court's decision to move forward with the constitutional questions in these circumstances represents a flagrant violation of the mootness doctrine.

Section 1(a) of SB 40 provides that local school boards have authority "[d]uring the state of disaster emergency related to the COVID-19 health emergency described in K.S.A. 2020 Supp. 48-924b" to "take any action, issue any order or adopt any policy made or taken in response to such disaster emergency that affects the operation of any school or attendance center of such school district." By the plain text of this provision, any action of a school board taken under this section is limited to the period of the disaster emergency. Section 1(d), which authorizes civil actions seeking to set aside school board actions taken under Section 1(a), therefore applied only during the COVID-19 disaster emergency.

The COVID-19 state of disaster emergency described in K.S.A. 2020 Supp. 48-924b was extended to June 15, 2021, by the Legislative Coordinating Council (LCC) as authorized by Section 4(a)(5) of SB 40. But the LCC did not extend the disaster emergency beyond that date.[1] As a result, the COVID-19 disaster emergency has now ended, and the school board's authority to issue a mask mandate under SB 40 has likewise expired. While the school district argued that Section 1 of SB 40 might apply to a future disaster emergency, under the plain text of the statute, this would be a "new" disaster emergency, *see* K.S.A. 2021 Supp. 48-924b, not "the" disaster emergency referenced in Section 1 of SB 40. *See Freytag v. CIR*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) ("The definite article 'the' obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution.").

As a consequence of the end of the COVID-19 disaster emergency and the corresponding expiration of the school board's authority under SB 40, constitutional challenges to Section 1 of SB 40 are moot. Courts generally cannot decide moot questions or render advisory opinions. *See State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866 (2012). The mootness doctrine "recognizes that it is the function of a judicial tribunal to determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case properly

[1] https://www.cjonline.com/story/news/coronavirus/2021/06/15/kansas-covid-emergency-declaration-expires-republican-mask-order-governor-laura-kelly-objects/7656962002/.

before" the court. *State v. Bennett*, 288 Kan. 86, 89, 200 P.3d 455 (2009) (quoting *Bd. of Johnson Cty. Comm'rs v. Duffy*, 259 Kan. 500, 504, 912 P.3d 716 (1996)).

Although there is an exception to the mootness doctrine when the issue "is one capable of repetition and one of public importance," *id.*, that exception does not apply here. The school board's authority under Section 1 of SB 40 and the civil action procedure provided thereunder apply during only "the COVID-19 health emergency," which has now expired. By the plain language of SB 40, the issue is not capable of repetition. Even if a new disaster emergency were to occur at some point in the future, SB 40 does not apply to future emergencies. As a result, the Legislature would have to pass new legislation, which may or may not contain the same provisions. There was therefore no justification for the district court to address the constitutionality of SB 40.

In addition to being moot, no party had standing to challenge the constitutionality of SB 40. As this Court recently held, "the basis for standing can change as litigation progresses," and a party can lose standing based on changed circumstances, thereby depriving the court of jurisdiction. *Baker v. Hayden*, ___ P.3d ___, 2021 WL 2766413 at * 6 (Kan. 2021). Thus, even if the school district would have had standing to challenge Section 1 of SB 40 when that law was in effect, the expiration of the disaster emergency extinguished the district's standing.

Accordingly, the Court should stay the district court decision because it *sua sponte* raised and decided moot constitutional issues that no party had standing to assert.

2. If the district court's order is not stayed, the confusion created by that order will persist and potentially hamper the State's ability to respond to a future disaster emergency, inviting the very sort of "legal anarchy" that troubled the district court. While the only purported constitutional infirmity identified by the court involved the provision of SB 40 granting the requested relief if a court decision is not issued within seven days, the court's decision broadly declares all of SB 40 "unenforceable."

But there are many provisions of SB 40 unconnected to the challenged judicial review process. For instance, Section 3 of SB 40 adds the Vice President of the Senate as an eighth member of the LCC. Likewise, Section 13 concerns procedures in the State Finance Council (SFC). Surely these provisions contain no constitutional infirmity, nor is there any reason why the district court could not have severed them from the allegedly unconstitutional provision of SB 40, as the Legislature clearly intended in adopting a severability clause. SB 40, sec. 14. But the broad language of the district court's opinion creates uncertainty about these provisions, uncertainty that could produce harm given the various responsibilities of the LCC and SFC. *See* K.S.A. 46-1201 *et seq.*; K.S.A. 75-3711.

Other provisions of SB 40 reenact or amend the State's emergency management laws in ways completely unrelated to the challenged provision in Section 1. For example, SB 40 also provides that the Legislative Coordinating Council rather than the SFC may extend a state of disaster emergency, SB 40, § 3(a); allows multiple 30-day extensions of a disaster emergency, *id.* at § 4(b)(3);

changes procedures for animal health emergencies, *id.* at § 4(b)(4); alters the process for legislative review of executive orders, *id.* at § 6(b); and places limits on the Governor's authority to issue certain executive orders, *id.* at § 6(d). If another emergency of any sort were to occur, the district court's order would create confusion about the validity of these provisions and hinder the State's ability to respond to the disaster.[2]

In denying the Attorney General's motion to stay, the district court incorrectly stated that it invited the Attorney General to address severability in its initial order. The only reference to severability in that order was that the "Court notes that SB 40 does contain a severability clause in § 14 to prevent the invalidity of other portions of the act if any portion of the same is declared unconstitutional or invalid." Ex. A at 19. Thus, although there was no reason for the district court to reach the constitutional issues since they were clearly moot, the Attorney General read the district court's order as an acknowledgment of the severability clause that would apply if necessary. In addition, in responding to the Attorney General's brief, the Shawnee Mission School District only argued that "the Court should . . . declare that Section 1(d) of SB 40 is unconstitutional and void"—not the entire law. Defendant's Response to Attorney General's Brief at 11.

Because of the confusion caused by the district court's overbroad order, the order should be stayed until this Court completes its review.

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[2] https://www.kcur.org/news/2021-07-30/who-can-tell-you-to-wear-a-mask-in-kansas-as-covid-surges-its-complicated.

3. Finally, a stay will not harm the Shawnee Mission School District because it does not currently suffer any injury as a result of SB 40. As the school district conceded before the district court, "Section 1 of SB 40 has expired, and it has no application to the SMSD Board of Education." Ex. A at 12. Of course, once it became clear that the district court was on track to *sua sponte* raise and decide moot constitutional issues in its favor, the school district sang a different tune and (incorrectly) asserted that it may be subject to some injury in the future. But an expired statute cannot harm anyone. Therefore, there is no reason not to stay the district court's order until this Court decides the Attorney General's appeal, which the Attorney General intends to pursue on an expedited basis.[3]

Conclusion

The Court should grant a stay of the district court's decision pending its ruling in this appeal.

Respectfully submitted,

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[3] The Attorney General is simultaneously filing a motion to expedite this appeal and asks for expedited consideration of these motions.

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CERTIFICATE OF SERVICE

I certify that a copy of this document has been served upon the following by e-mail on this 2nd day of August, 2021:

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EXHIBIT A

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

BUTLER, KRISTIN, and BOZARTH, SCOTT,

Plaintiffs/Petitioners

Case No. 21CV2385

vs.

Chapter 60; Division 7

SHAWNEE MISSION SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant/Respondent.

ORDER ON PLAINTIFFS' SENATE BILL 40 REQUEST FOR RELIEF WITH NOTICE TO THE ATTORNEY GENERAL

Plaintiffs, Kristin Butler and Scott Bozarth ("Plaintiffs"), filed a petition using the form allowed by the Kansas Supreme Court under 2021 Senate Bill 40, ("Petition") on May 28, 2021 in this SB 40 action, naming as defendants, the Shawnee Mission School District ("District") and its individual board members.[1] Ms. Butler has two children, ages 7 and 10, who had attended Rhein Benninghoven Elementary School. Mr. Bozarth has a 14 year-old who just completed attendance at Hocker Grove Middle School.

Because this is intended to be an expedited proceeding under Senate Bill 40 ("SB 40"), the Court will address only issues pertinent to the immediate relief raised and requested in the petition.

[1] At the Zoom hearing and Division 7's YouTube channel, https://youtu.be/cY19lxxTDQg on June 2, the parties consented to remove all the individual board members as defendants as it is apparent the relief sought relates to a policy enacted by the board. Consequently, the Court dismissed all the board members. Doc. 6.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

A summary of SB 40's quick enactment, the courts necessary reaction to the same, and its provisions are in order. On March 16, 2021, the legislature approved SB 40. It immediately went into effect, as directed, when it was published in the Kansas Register on March 25, 2021. Most laws are enrolled to go in effect on July 1.

The plaintiffs used a form petition, provided by the Kansas Supreme Court, but apparently were not aware of the additional local rule requirement, enacted before the supreme court form, that directed the form of filings and information required for an SB 40 petition, notably, that the petition be verified under oath. The Court rectified this at the hearing on Wednesday, June 2, by swearing in the plaintiffs.[2]

SB 40 Section Applicable to this Action

As the preamble to SB 40 states, it is intended to address governmental responses (and powers) to address the Covid-19 pandemic. These include the executive branch, all governmental units, school districts and local health departments. Section 1 is pertinent. The Court has emphasized below the critical provisions for proceedings involving school district appeals and the standards and deadlines that are to be applied. SB 40 has not yet been enrolled in the statute books:

> (a) (1) During the state of disaster emergency related to the COVID-19 health emergency described in K.S.A. 2020 Supp. 48-924b, and amendments thereto, only the board of education responsible for the maintenance, development and operation of a school district shall have the authority ***to take any action, issue any order or adopt any policy***[3]

[2] Our courts strive to allow self-represented persons access to justice in a manner that allows a fair opportunity to be heard in a forum typically predominated by legal professionals so that the merits of a case, win or lose, are both understood and explained. This is known as procedural fairness and ensures access to justice. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Tom R. Tyler, Social Justice: Outcome and Procedure, 35 INT'L J. PSYCHOL. 117 (2000). In theory, a self-represented person is more willing to accept the outcome of a proceeding if she believes she has been heard. Allowing the self-represented a right to be heard, however, cannot be accomplished at the expense of represented parties. In other words, the rules are created to protect all parties to the proceedings.

[3] This is the same word series which appears in § (c)(1) relating to the 30-day time to appeal the same.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

made or taken in response to such disaster emergency that affects the operation of any school or attendance center of such school district, including but not limited to, any action, order or policy that:

(A) Closes or has the effect of closing any school or attendance center of such school district;

(B) authorizes or requires any form of attendance other than full-time, in-person attendance at a school in the school district, including but not limited to, hybrid or remote learning, or

(C) ***mandates any action by any students or employees of a school district while on school district property***.

(2) An action taken, order issued or policy adopted by the board of education of a school district pursuant to paragraph (1) shall only affect the operation of schools under the jurisdiction of the board and shall not affect the operation of nonpublic schools.

(3) During any such disaster emergency, the state board of education, the governor, the department of health and environment, a local health officer, a city health officer or any other state or local unit of government may provide guidance, consultation or other assistance to the board of education of a school district but shall not take any action related to such disaster emergency that affects the operation of any school or attendance center of such school district pursuant to paragraph (1).

(b) Any meeting of a board of education of a school district discussing an action, order or policy described in this section, including any hearing by the board under subsection (c), shall be open to the public in accordance with the open meetings action, K.S.A. 75-4317 et seq., and amendments thereto, and may be conducted by electronic audio-visual communication when necessary to secure the health and safety of the public, the board and employees.

(c) (1) An employee, a student or ***the parent or guardian of a student aggrieved by an action taken, order issued or policy adopted by the board of education of a school distric***t pursuant to subsection (a)(1), or an action of any employee of a school district violating any such action, order or policy, ***may request a hearing by such board of education to contest such action, order or policy within 30 after the action was taken, order was issued or policy was adopted by the board of education.*** Any such request shall not stay or enjoin such action, order or policy.

(2) ***Upon receipt of a request under paragraph (1), the board of education shall conduct a hearing within 72 hours of receiving such request for the purposes of reviewing, amending or revoking such action, order or policy. The board shall issue a decision within seven days after the hearing is conducted.***

(3) The board of education may adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection, including but not limited to rules for consolidation of similar hearings.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

(d)(1) An employee, student or ***the parent or guardian of a student aggrieved by a decision of the board of education under subsection (c)(2) may file a civil action*** in the district court of the county in which such party resides or in the district court of Shawnee county, Kansas ***within 30 days after such decision is issued by the board***. Notwithstanding any order issued pursuant to K.S.A. 2020 Supp. 20-172(a), and amendments thereto, the court shall conduct a hearing within 72 hours receipt of a petition in any such action. ***The court shall grant the request for relief unless the court finds the action taken, order issued or policy adopted by the board of education is narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to achieve such purpose. The court shall issue an order on such petition within seven days after the hearing is conducted. If the court does not issue an order on such petition within seven days, the relief requested in the petition shall be granted.***

(2) Relief under this section shall not include a stay or injunction concerned the contested action, order issued or policy adopted by the board of education that applies beyond the county in which the petition was filed.

(3) The supreme court may adopt emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection, including but not limited to, rules for consolidation of similar hearings.

As a result of SB 40, a number of cases were filed in this Court's various divisions.[4]

Supreme Court Administrative Order 2021-RL-032

In response to SB 40, the Kansas Supreme Court issued its A.O. 2021-RL-032 (filed 4/13/21), that sets out emergency rules and suggested forms, depending on the governmental entity being challenged for Covid-19 restrictions. It enumerates the contents of the petition to assist district courts in prioritizing these new causes of action, spurred by the legislative reaction to

[4] Division 7 previously had a case, *Baker v. Blue Valley and Olathe School Districts, et al.,* Case No. 21CV1942, (filed 5/3/21), but the case was removed to federal court under 28 U.S.C. 1446(d), because the plaintiffs had invoked a federal constitutional right under the Equal Protection Clause. Docs. 25, 26 (filed 5/6/21). That case had over 20 defendants and over 1,200 documents attached to the petition. Recently, a similar case has been filed again in this division. *Baker v. Blue Valley School District (Merrigan) et al.*, Case No. 21CV2505 (filed 6/4/21), even though the federal case is pending between the same parties and, presumably, could be amended, because it asserts that an update to the district's pandemic policy occurred on May 28. ¶ 10 of Doc. 1.

Another division of the Court, Division 6, determined, in part, that the requested relief was impermissible because it sought to challenge, retroactively, a policy enacted before SB 40 and, therefore, changed substsantive rights. It is cited in the District's motion to dismiss which will be discussed below. *See Charlotte I. O'Hara v. Blue Valley School District and Blue Valley School District Board of Education*, Case No. 21CV01464, Journey Entry dated April 28, 2021.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

pandemic policies enacted by school districts and other governmental units. In particular, it requires the petitioner to identify the who, what, when, where, why and how that any governmental entity has infringed upon some individual concern.[5]

Johnson County Administrative Order No. 21-01

Even before the issuance of 2021-RL-032, the Tenth Judicial District issued its administrative order to handle anticipated SB 40 cases. The supreme court order recognized this, by noting that "[t]hese emergency rules should be read *in conjunction with other applicable rules*, statutes, and Supreme Court Administrative Orders. But these rules control if any provision of a (a) Supreme Court rule or order or (b) district court rule or order conflicts with these rules."

In many respects, both of the above administrative rules require that judges be given basic information to know the basis for the case arriving on their doorsteps in an expedited fashion. The local district rule requires the petitioner provide actual filing notice to the respondent (or defendant government) no less than 24 hours after its filing. It likewise requires a response within 24 hours. In each instance, and unlike 2021-RL-032, it requires a verified petition and response. This cuts down on evidentiary issues at the anticipated expedited hearing and also ensures the litigants are undertaking the significance of the process that supplants other cases.[6]

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[5] The rule makes clear that the self-represented petition should not be rejected for failing to meet some requirements:

> The court approves these emergency rules of procedure with an understanding some petitioners may be unrepresented. Accordingly, failure to comply with this order or complete the attached forms is not a reason for a clerk to reject a submission. A court must allow a petitioner to supplement the petition with omitted information required by this order when justice so requires.

[6] In cases of domestic violence, for example, a verified petition is required for emergency *ex parte* relief for protection from abuse even before the defendant is afforded a hearing. K.S.A. 60-3105(a). The Protection from Abuse Act recognizes that the self-represented often will resort to its protections and instructs that it should be liberally construed to facilitate access to justice. K.S.A. 60-3101(b).

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

One of the difficulties with SB 40, however, is that it provides little in the way of procedures. It provides short deadlines and an immediacy that appears intended to short-circuit other court cases which often have emergent issues, such as domestic violence or business restraining orders. Even in domestic violence protection cases, the defendant has 21 days from the filing of the petition to respond at a hearing. K.S.A. 60-3106. Here, the defendant school district has 72 hours from the filing of the petition to respond.

Because courts cannot render an advisory opinion and must make factual and legal conclusions in their decisions, the verification standard provides a factual basis for an expedited ruling. Merely stating, for example, that statements are made upon a party's "best knowledge and belief" is not sufficient, factually, to proceed with a decision. *Marriage of Bahlmann*, 56 Kan. App. 2d 901, 907, 440 P. ed 597 (2019).

Local A.O. No. 21-01 also fills in the details of the procedure lacking in SB 40 because it requires production of the order by the governmental unit or school district that is the subject of the "action" to be reviewed. Sometimes, the record is lacking in appeals to the district court so that the court may have to remand the matter to obtain necessary information before it can finalize a decision. *See Wheatland Elec. Co-op., Inc. v. Polansky*, 46 Kan. App. 2d 746, 749, 265 P.3d 1194, 1199 (2011) (noting that district court decision is not final until after remand to agency).

Local A.O. No. 21-01 allows for a court to make its final determination after the hearing or any continuances have been completed. In complex cases, it would be impossible for the Court, potentially, to hear all of the evidence in one day.

Lastly, the local A.O. asks the petitioner to identify any underlying process where the petitioner was allowed to appear and raise any issues prior to the adoption or issuance of any

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

relevant order or policy under review to identify the aggrieved plaintiff's burden or alternative suggestions the petitioner may have raised. This is significant because a court is required to consider whether the school district used a means that "is narrowly tailored to respond to the state of emergency and [that] uses the least restrictive means to achieve such purpose" An additional requirement of the local A.O. is to certify whether the petitioner had the opportunity to appear and to be heard to have an opportunity to raise the issues the court is supposed to review.

The Decision the Court is Being Asked to Review

The plaintiffs, in their petition, seek review of an email dated May 6, 2021, from the superintendent of schools after it became apparent the plaintiffs were questioning the entire school pandemic policy and not some specific action taken against their children. The District justified, in its response, in denying the plaintiffs a hearing, that the determination by another division in another case had denied relief under similar circumstances:

> The action taken, order issued, or policy adopted by the board did not happen within 30 days of the request. Please see paragraph 2 of the attached Order, dated April 28, 2021, issued by the Hon. Robert J. Wonnell, Judge of the District Court of Johnson County, Kansas. The Board of Education's Resolution on Affirming Reopening Plan was adopted more than 30 days ago (adopted July 27, 2020). The Board has not made any changes to this Resolution since it was adopted.

Before addressing this issue, the Motion to Dismiss[7] filed by the District, which the Court will now address as part of its overall order, essentially asserts that the plaintiffs may not contest a policy enacted before SB 40 took effect. In the case referenced, *Charlotte I. O'Hara v. Blue*

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[7] At the hearing of this matter, the District's motion was argued. Tthe plaintiffs were asked if they wished to file a response. This is a civil action, § (d)(1) (noting the same) and K.S.A. 60-201(b) states that the code of civil procedure governs such proceedings. Other than the shortened time frames, K.S.A. 60-212 allows for motions to dismiss. Both plaintiffs indicated they were prepared to respond to the District's motion and did so. At the end of the hearing, however, the Court indicated it would take under advisement the motion and make any further orders necessary in its written order.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

Valley School District and Blue Valley School District Board of Education, Case No. 21CV01464, the Hon. Robert J. Wonnell, Division 6, resolved the case by first finding that Ms. O'Hara did not have standing to object to the mask policy and, second, determined that her challenge sought to impose a retroactive and substantive change in the law which was not indicated in SB 40.

The retroactivity portion of the *O'Hara* court's order addresses the *status quo* policy that was enacted before SB 40 came into effect. The reference to appealing decisions within 30 days assumes that efforts to contest mask policies put into effect before SB 40 became law cannot be contested as new "actions, orders or policies" because to do so would retroactively impose standards that were not in effect at the time. In other words, when all branches of state government were grappling with responses to the pandemic, they implemented measures to prevent the spread of the COVID-19 virus.[8]

On March 12, 2020, Governor Laura Kelly issued an emergency declaration for the State of Kansas in response to COVID-19. On March 17, 2020, Governor Kelly extended the closure of K-12 schools for the duration of the 2019-2020 school year by Executive Order # 20-07. Like all schools across the country, SMSD undertook measures for school operations during the 2020-21 school year. On July 27, 2020, the SMSD Board of Education approved a Resolution Affirming

[8] The Court would note that the Judicial Branch is no different. It instituted various protocols for emergency hearings for in-person hearings, allowed for remote proceedings for most all cases, and, to this day, still requires masking in courthouses, even though Johnson County, for example has lifted its mask requirements. The Tenth Judicial District, while it occupies a county facility, is a state judicial facility administered by the Kansas Supreme Court. The court, in turn, takes its administrative guidance from its chief justice and its chief judge. Overall authority on COVID matters is addressed by 2021-PR-048 (requiring all district and appellate courts to develop and follow minimum standard health protocols to avoid exposing court users, staff and judicial officers to COVID-19). Johnson County A.O. 21-04 (filed 5/31/21) (beginning 6/1/21, allowing fully vaccinated persons to be in courthouse but if not vaccinated, requiring use of a mask and requiring all jurors, vaccinated or not, to continue to wear masks).

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

Reopening Plans.[9] By this Reopening Resolution, the Board affirmed the school reopening plan,[10] which included a cloth mask requirement for students, staff, and visitors , and which was "informed by actionable criteria articulated by the Centers for Disease Control and Prevention, the Kansas Department of Health and Environment, and the Johnson County Department of Health and Environment."

The facts developed at the hearing are that Ms. Butler's two children received exemptions from wearing masks. However, because they were distanced under CDC protocols from other masked children, she contends that they suffered psychological harm and ended up wearing masks so they would fit in. One of them now will attend a summer band camp sponsored by the district but the exemption is still in effect. Ms. Bozarth testified that he could have sought an exemption from the masking requirement but chose not to do so because of ostracism concerns if his child did not wear a mask. Thus, it is apparent the plaintiffs offer a Catch-22 dilemma that can only be resolved by abolition of any mask policy.

Essentially, then, the Court is faced with the criticism of *any* mask policy from the plaintiffs and their view that the superintendent of schools did not give them a "hearing." The question begs itself, a hearing to do what? The District's motion assumes that the plaintiffs want to contest the policy that was enacted more than 30 days ago. The email is not an "order" or "policy" or "action"

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[9] The SMSD Board of Education's July 27, 2020 Resolution is publicly available on the SMSD website: https://go.boarddocs.com/ks/smsd/Board.nsf/files/BRWPH564A4EF/$file/Resolution%20on%20Reopening%20Plan.pdf

[10] SMSD's Operational Plan for Reopening Schools is publicly available on the SMSD website: https://go.boarddocs.com/ks/smsd/Board.nsf/files/BRRTPY75F341/$file/2020-21%20Operations%20and%20Student%20Services%20Plan%20for%20Reopening%20Schools.pdf

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

itself but an acknowledgment that the District is doing nothing new and there is nothing to "hear." The plaintiffs have not identified any action, order or policy occurring within the past 30 days.

In arguing on behalf of both parents, Mr. Bozarth made it clear that they are contesting the original policy, not just the effects of granting exemptions or the need for social distancing. He argued, very clearly, that the mask mandate "should never have been in place in the first place." This is clear form their petition which they verified before the Court:

> Butler's and Bozarth's child/children are mandated (syn commanded, directed, instructed) to wear masks in order to attend school. *This violates federal law, the ethics of the Nuremberg code, and a parent's right to decide medical treatment for their child.* Further, the district cannot and will not produce empirical scientific data justifying their policy nor any analysis informing parents, students, and staff of risk and benefits of the policy. (Emphasis added.)

Both tried to argue that sticking to the policy was something new at the hearing, aware of the fact that they had not identified any new action, order or policy. Attached to the petition is an email from Mr. Bozarth to the board members in which he says that "I take grievance with your COVID response." He then requests a hearing over his daughter's required use of a mask, claiming it borders on "wreckless [sic] endangerment and/or assault. My child is being harmed physically, mentally and emotionally by the SMSD policy requiring masks." Thus, he avoided seeking an exemption and allowed his daughter to continue to wear a mask but maintains the harm from this is the District's fault. But the policy at stake is not new. Nor is a continuation or reaffirmation of the policy new.

"The "relief" requested in the petition seeks a return of the filing fee, compensating expenses for "consulting doctors about health issues [Mrs. Butler's] children suffered as a result of the district's policy," and Mr. Bozarth's request for documents, essentially, contesting the foundation of the district's Covid-19 policy, the medical professionals it relies upon, and "removal

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

of mandatory masks." This is not an action for discovery, but a truncated hearing to address emergent issues. In every respect, then, it is apparent that the focal objective of the "aggrieved decision" is not an email but the policy that is almost eleven months old. Plaintiffs essentially object to the continuation of the policy and contest the original criteria for the original masking requirement. They do attach, however, an April 30,2021, email that indicates the district is keeping "**all mitigating procedures, including mandatory mask-wearing, in place**. This is consistent with the advice we received yesterday from Dr. Sammi Areola, Director of the Johnson County Department of Health and Environment." (Emphasis in original.)

One of the difficulties here is that the District superintendent, Dr. Michael Fulton, refused to provide any "hearing" which seems arbitrary until one determines the history of the complaints by the plaintiffs that makes it abundantly clear they are targeting the entire policy. A hearing is usually something that seeks some individualized or adjudicative response by a complaining party regarding something specific that has happened to them. Neither of the plaintiffs here seek individual relief from the policy, the denial of which would be a decision or "action" from which a hearing and appeal might be necessary. They apparently already had appeared in front of the school board and made their displeasure known with the mask policy. So it is understandable that Dr. Fulton determined, as an agent of the board, that no "hearing" was needed to hear the same complaint about the policy enacted in July 2020.

As the Court learned at the hearing, Ms. Butler's children are exempt from the masking policy but did not like the social distancing requirement that attended their exemption. Mr. Bozarth likewise indicated he could have obtained the same exemption but chose otherwise because he objects to the policy itself. If the legislature intended to directly challenge existing policies in school districts, it should have stated that plainly. However, it did not do so.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

In the unlikely event the legislature intended to unleash the floodgates of litigation with every person who objects to a mask policy, the Court then would have the obligation to conduct a trial over the health guidelines, expert testimony and CDC guidelines that have been the foundation of many of pandemic rules used by the various government entities.

While District counsel argued that the superintendent's decision was not the "decision" of the board, this is too fine of a distinction. Dr. Fulton is obviously authorized to speak on behalf of board policy, including SB 40 issues. SB 40, section (c)(3) provides:

> The board of education *may adopt* emergency rules of procedure to facilitate the efficient adjudication of any hearing requested under this subsection, including, but not limited to, rules for consolidation of similar hearings.

The District is not required to adopt procedures for hearings. But it can directly respond through its designated agent that it is not providing a hearing because it is not necessary once it gauges what the aggrieved person really is seeking. The Court has no information about District procedures, if they exist or Dr. Fulton's actual board-conferred authority with regard to SB 40 hearings. That is not the District's burden. Rather, the plaintiffs bear the burden of proof that requires them to identify the "action" from which they are "aggrieved." Here, the Court determines there is no action that required a hearing.

The District's motion points out that Section 1 of SB 40 has expired,[11] and it has no application to the SMSD Board of Education because it only applies only to actions taken from March 25, 2021, through the end of the COVID-19 state of disaster emergency. As part of SB 40 (Section 5), the state of disaster emergency ended on May 28, 2021. Further, the 2020-21 school

[11] Section 1(a)(1) states: "During the state of disaster emergency related to the COVID-19 health emergency..."

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

year ended the day before plaintiffs filed their SB 40 Petition, on May 27, 2021. The District argues, then, that plaintiffs' children are no longer attending school and cannot be "aggrieved."

A little more nuanced argument is the District's argument that the legislature cannot impose retroactive liability on the District. This is a question of law. *State v. Brownlee,* 302 Kan. 491, 508, 354 P.3d 525 (2015). Generally, a statute operates prospectively unless there is clear language to indicate otherwise unless the statute is procedural only. *Norris v. Kansas Employment Security Bd. of Review*, 303 Kan. 834, 841, 367 P.3d 1252 (2016).

SB 40 does a couple of things to suggest a substantive change in the law. First, it does not defer to the independent decision-making of school boards unless it was intended to question all pandemic responses of every government entity. Assuming otherwise, the more logical view is that actions taken after the law's effective date can be reviewed and subject to strict scrutiny to ensure it is narrowly tailored to ensure the most limited application to the individual. Local school boards have a recognized state constitutional in that they are generally supervised by the state board of education which is required to maintain, develop, and operate local public schools through locally elected boards. Art. 6, § 5 of the KAN. CONST.

The legislature does not have *carte blanche* authority over school districts which do not have self-executing authority under the constitution. *Unified Sch. Dist. No. 229 v. State*, 256 Kan. 232, 253, 885 P.2d 1170, 1183 (1994). In that way, both the legislature and school districts have vested duties that must be harmonized. Eliminating school districts' authority to enact measures to protect public health and safety would be a remarkable and substantive change.

Accordingly, any change in SB 40 to change the authority of school boards in protecting the public health of its students, staff and patrons would be a dramatic change. SB 40 must be

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

viewed, then, as protecting on prospective changes in policy after SB 40 became law. But here, it has no application to the plaintiffs who complain about past injuries under a policy enacted in July of 2020. And, they do not claim about an application of the policy that is unique to them or that injures them. Indeed, the exemptions were narrowly tailored and presented the least restrictive means in any exemption application (or not) to the plaintiffs. Arguing that a reaffirmation of a policy to fit within SB 40's 30-day requirement to appeal from its enactment, does not make it new. The law is not retroactive and cannot be reasonably interpreted to address anything more than a change in policy or an individualized application that demonstrates a harm plaintiffs have failed to identify.

Problems with SB 40[12] and the Plaintiffs' Claims

When district courts are required to review the actions of administrative or other actions, typically an available remedy is to remand the matter to make sufficient determinations. Normally, when an administrative agency, for example, adopts an order or regulation, it is presumed valid. *Barbury v. Duckwall Alco Stores,* 42 Kan.App.2d 693, Syl. ¶ 1, 215 P.3d 643 (2009).

The difficulty in SB 40, however, is that it seems to preempt all other civil actions in preference for an SB 40 petition. It requires an interpretation of whether the districts have used aa narrowly tailored approach with the least restrictive means to regulate the pandemic mitigation measures. A different standard, however, exists for an aggrieved person contesting one of the

[12] The Court raises these serious issues *sua sponte* because it has been given no choice but to adjudicate a case and controversy within a scheme that cannot be separated from its impact on the judiciary. *Tolen v. State*, 285 Kan. 672, 675–76, 176 P.3d 170, 173 (2008) (citing *State v. Adams,* 283 Kan. 365, 367, 153 P.3d 512 (2007) (addressing a speedy trial issue *sua sponte* because consideration of the issue was necessary to serve the ends of justice or prevent the denial of fundamental rights).

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

other governmental units identified in SB 40 who must show that he or she is "substantially burdened."[13]

SB 40 imposes a hard 72-hour hearing requirement for both the school district and the courts. It then imposes a seven-day decision requirement after holding an evidentiary hearing (assuming the hearing can be completed in one day). Assuming that pandemic health advisories and guidelines may change and impact people with real consequences, the application of an existing policy either individually requiring exemptions or the creation of a new policy seems to be the intent of SB 40's mandate. Neither of those applies here.

SB 40 is vague o in a number of respects. It does explicitly state that these hearings are *de novo*, meaning it starts all over again. But it does suggest underlying district hearings that are subject to review. But it also hobbles the defendant if the court, for whatever reason, fails to render a decision within a very short period of time.[14] This division of the Court alone has had three such matters assigned to it, one of which was removed to federal court, had numerous plaintiffs and defendants, with over 1,200 documents attached to the petition. The principal plaintiffs in that case filed another SB 40 case. Several other cases were filed in Division 6.

Of great concern is the attempt to pressure courts to give preference to hear and then decide such cases within seven days of the hearing or otherwise "**the relief requested in the petition shall be granted.**" This leaves open the likelihood that wildly inappropriate claims for relief, damages or even an injunctive requests to strike down carefully calibrated policies would prevail

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[13] *See* Section 8 (e)(1) ("Any party aggrieved by an action taken by a local unit of government pursuant to this section that has the effect of ***substantially burdening*** or inhibiting the gathering or movement of individuals or the operation of any religious, civic, business or commercial activity..." Emphasis added.

[14] Supreme Court Rule 166(a) requires a ruling on most civil motions within 30 days after final submission and, in other civil matters a ruling within 90 days. Rule 166(b).

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

with judicial consideration. Here, plaintiffs seek damages allegedly done to their children because they had to wear masks. SB 40 does not mention damages. But, by legislative *fiat,* SB 40 necessarily declares all these considerations forfeit if the requested relief is not addressed immediately. It allows for no judicial consideration or discretion but still seeks the imprimatur of a legal judgment. The Court is aware of no case where a legislature can eliminate due process in favor of the party that bears the burden of proof if an adjudication is tardy.

In this case, for example, the children of the plaintiff/petitioners are not attending school or even compelled to be in school or wear masks. Ms. Butler's one child will be in band camp which does not begin until June 14-18, and, presumably, is a voluntary program where her child is not compelled to either attend much less wear a mask. After carefully questioning the plaintiffs, it is apparent their SB 40 suit is not about any policy that occurred with the past 30 days.

The apparent emergency features of SB 40 do not apply to this case. Plaintiffs' children are not in school. Courts do not decide moot issues or render advisory opinions unless a real controversy exists that requires determination. *State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866, 869 (2012. While the mootness doctrine is subject to exceptions, including one where the harm is capable of repetition or involves a question of public importance, *State v. DuMars,* 37 Kan.App.2d 600, 605, 154 P.3d 1120, *rev. denied* 284 Kan. 948 (2007), the nature of the pandemic and its now-shifting guidelines makes it highly doubtful that the pandemic policy that was enacted in the dark days of uncertainty, will be the same policy, if any, in the months ahead before schools reopen in the fall. Noting has changed since July 2020.[15] Accordingly, this action is subject to

[15] At the hearing of this matter, both parents agreed that their complaints related to the mask policy although Ms. Butler's children had exemptions from that policy. Mr. Bozarth testified he could have obtained one but chose not to subject his daughter to the stigmatization of social distancing that attended that Ms. Butler's children when they showed up without masks. They ended up choosing to wear masks to avoid the stigma. .

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

dismissal as moot without a showing of specific and current harm to the plaintiffs that meets the requirements of SB 40. Plaintiffs are ordered to demonstrate, within 10 days of this order, any action, beyond an email, that the District has taken that constitutes some current policy that impacts their children. If they cannot demonstrate the same, this suit will be dismissed.[16] Even if plaintiffs conceivably could show some harm, significant problems exist with SB 40.

The most significant issue is the default provision identified above that declares the plaintiff's relief requested as sacrosanct if the court fails to render its decision within seven days of the hearing. This goes far beyond the legislature's previous attempt to demand judicial adherence to legislative deadlines about when decisions emanate from the supreme court.[17]

> Whether a statute is unconstitutional because it violates the separation of powers doctrine is for this court to determine. Because, as we reaffirmed just last year, "the final decision as to the constitutionality of legislation rests exclusively with the courts ... [T]he judiciary's sworn duty includes judicial review of legislation for constitutional infirmity.' [Citation omitted.]" *Gannon v. State,* 298 Kan. 1107, 1159, 319 P.3d 1196 (2014); *State ex rel. Slusher v. City of Leavenworth,* 285 Kan. 438, 452–53, 172 P.3d 1154 (2007) (declaring veteran's preference statute constitutional); *Petersilie v. McLachlin,* 80 Kan. 176, 180, 101 P. 1014 (1909) (holding unconstitutional a legislative declaration of the truth of facts because an invasion of the province of the judicial branch); *Auditor of State v. A.T. & S.F. Railroad Co.,* 6 Kan. 500, 506, 1870 WL 507 (1870) ("It is emphatically the province and duty of the judicial department to say what the law is.") (quoting *Marbury v. Madison, 5 U.S.* [1 Cranch 137, 177, 2 L.Ed. 60 [1803]).

State v. Buser, 302 Kan. 1, 2, 2015 WL 4646663 *2 (2015) (holding K.S.A. 20-3301 (Supp. 2014), using similar language to SB 40 that if supreme court fails to enter its decision within 30 days of

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[16] Because the Court is informing the attorney general to intervene in this matter, it will withhold final judgment in this case, pending a response.

[17] It also conflicts with the Supreme Court's administrative authority in Rule 166, allowing district courts 30 days to render decisions on motions.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

a joint request for a decision from counsel, the chief justice must establish a "firm intended decision date by which the court's decision shall be made.").

SB 40, in addition to establishing very short deadlines for hearings and decisions that conflict with both local rules and supreme court rules, penalizes the governmental defendant if a decision fails to emanate within seven days of a hearing. It does this repetitively in each of its applicable sections. § 1(d)(1) (boards of education); § 2(d)(1) (community colleges); §6 (g)(1) (gubernatorial action)[18]; § 8 (e)(1) (local units of government); § 12 (d)(1) (local health officer determinations). In this manner, SB 40 defaults the defendant and gives the plaintiff whatever relief is requested. So, if a patron does not like masks or ascribes to an unscientific or fringe theory that contests pandemic policy measures, it may seek to strike the same down through defaulted injunctive relief. The judicial trigger in SB 40 is: "do this now or else," which threatens to heap public opprobrium on the courts for even permitting such relief to occur by default.

In other words, SB 40 tips the scales of justice toward the plaintiff as a judicial goad. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citation omitted).

Potentially, any governmental defendant who presents objections is at risk for a default pinned to the failure to issue a decision. The rules for default judgments are contrary to this scheme. Procedural due process requires a hearing *before* there is a permanent deprivation of

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[18] Added into SB 40's restrictions against gubernatorial disaster or emergency powers are that the governor may not limit or otherwise restrict anything related to firearms or ammunition, (d). or have the power to alter or modify any election laws, (e). These are tied into the "aggrieved" persons who can contest any executive order.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

rights [judgment], although an *unresponsive defendant* may forfeit this constitutional right. *Bazine State Bank v. Pawnee Prod. Serv., Inc.*, 245 Kan. 490, 494, 781 P.2d 1077, 1081 (1989) *cert. denied*, 495 U.S. 932 (1990) (upholding default for failure to answer as not a violation of due process). A judgment entered without due process, however, is void if a court acts inconsistently with the same, *id.* at 495-96, and the same should apply to legislative acts that are inconsistent with due process.

SB 40 disrupts due process upon pain of an insufficiently responsive judiciary that awaits disposition on the merits. But, if not decided within the short deadline imposed, the defendant suffers the stinger of a judgment without judicial determination. SB 40 eliminates the role of the judiciary, then, in deciding its cases. A fundamental rule of statutory construction is that the intent of the legislature governs, and that courts must adhere to K.S.A. 60-102 to secure *the just*, speedy *and* inexpensive determination of every action. (Emphasis added). These are conjunctive requirements. Speed or expediency cannot supplant a just determination. *Fisher v. DeCarvalho*, 298 Kan. 482, 500, 314 P.3d 214, 224–25 (2013) (reversing district court's dismissal with prejudice of malpractice action that failed to meet service requirements).

The Court is convinced that SB 40 presents significant constitutional problems that require the intervention of the Kansas Attorney General pursuant to K.S.A. 75-764(b)(2) (requiring notice of the disputed validity of a statute to be served on the attorney general to be given an opportunity to appear and be heard). The Court notes that SB 40 does contain a severability clause in § 14 to prevent the invalidity of other portions of the act if any portion of the same is declared unconstitutional or invalid.

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

By copy of this order, the Court invites the attorney general to appear to intervene and be heard on this matter. Likewise, the parties may brief or address any arguments raised by the Court or through any intervention.

Accordingly, the Court will withhold finalizing its order until such a hearing can be scheduled but otherwise denies the plaintiffs any relief as being moot and untimely for the reasons stated above unless they can demonstrate additional evidence that they believe the Court has overlooked. If plaintiffs submit additional evidence they shall do so through a verified brief or pleading that does not depend upon any technical format but should be sent to the District with a certificate of mailing and filed with the clerk of the district court under any heading that indicates it is a response to the Court's order. Under Supreme Court Rule 133(a), the Court does not find that further oral argument on plaintiffs' additional evidence, if any, will aid the Court in its decision. Defendant may respond to any such further evidence within 10 days.

If the attorney general decides to intervene, the Court will schdedule oral argument for such hearing only.

IT IS SO ORDERED.

6/8/21 /s/ David W. Hauber

DATE DISTRICT COURT JUDGE, DIV. 7

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60 258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e mail addresses provided by counsel of record in this case and any self-represented parties. The Court also notifies the attorney general by email at ksagappealsoffice@ag.ks.gov.

/s/ DWH

Clerk of the District Court, Johnson County Kansas
06/08/21 04:54pm NG

EXHIBIT B

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

BUTLER, KRISTIN, and BOZARTH, SCOTT,

Plaintiffs/Petitioners

Case No. 21CV2385

vs.

Chapter 60; Division 7

SHAWNEE MISSION SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant/Respondent.

JUDGMENT AND FINAL ORDER AFTER INTERVENTION

BY THE KANSAS ATTORNEY GENERAL

Background to this Order

On June 8, 2021, the Court entered an order denying relief to the plaintiffs, Kristin Butler and Scott Bozarth, over their efforts to protest the Shawnee Mission School District ("District") policy, enacted in July of 2020, that involved masking to stem transmission of the Covid-19 virus. It allowed, however, the plaintiffs to submit any further evidence the Court may have overlooked at the June 2 hearing. Doc. 8 at 20. Having failed to provide any such evidence, the Court will finalize its order.

Secondarily, the Court asked the Kansas Attorney General to intervene in this matter because of identifiable constitutional issues in SB 40 that, in many respects, have become the basis for parents protesting school masking policies.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

A court is required to give the state the opportunity to address potential unconstitutional legislation through notification to the Attorney General before declaring legislation unconstitutional. K.S.A. 75-764(b)(2). A twenty-one-day response time is allowed by statute, but intervention occurred on June 11 and a brief addressing the constitutionality of SB 40 was filed on June 23 (15 days after the order). Doc. 11.

Since the filing of the Attorney General's brief, the District has filed its own brief, Doc. 13, and it essentially urges the Court to enter judgment for the District and to find SB 40 unconstitutional "on its face." *Id.* at 2. At the same time the District filed its brief, the Kansas Association of School Boards Legal Assistance Fund ("LAF") sought to file an *amicus curiae* brief on behalf of the 280 public schools and 31 education cooperatives it represents and submitted its brief. *See* Docs. 15, 16. The Court grants such application, *instanter*, after notifying the parties of the request.[1] Finally, the Attorney General filed a reply brief to the District's brief, Doc. 18, that presses the same arguments as before, albeit with citation to a new case.[2]

Summary of the Court's Final Order: SB 40 Violates the Constitution

The Court is now prepared to finalize its order.[3] For reasons that will be outlined below, the Court finds SB 40, particularly its enforcement provision, unconstitutionally deprives the

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[1] Mr. Bozarth objects that LAF "is not a friend of the court." *Amicus* briefs offer a perspective by interested parties and those who may be impacted by a case. *Montoy v. State*, 279 Kan. 817, 819, 112 P.3d 923 (2005) (noting ten *amici curiae* briefs were filed). Practically speaking, nothing new has been raised, consistent with the restrictions on such briefing. *Hall v. State Farm Mut. Auto. Ins. Co.*, 8 Kan. App. 2d 475, 481, 661 P.2d 402 (1983). The Attorney General did not object to the *amicus* brief.

[2] Ordinarily, a reply brief cannot raise new issues or simply reiterate arguments from the initial brief. *Edwards v. Anderson Eng'g, Inc.*, 284 Kan. 892, 896, 166 P.3d 1047, 1051 (2007). Here, the reply brief *does* cite to a recently released case, *Baker v. Hayden*, ___ P.3d ___, 2021 WL 2766413 (Kan., July 2, 2021), but then it cites to an unpublished case that was available for the initial briefing.

[3] Neither the Attorney General or the District's counsel asked for oral argument. Accordingly, the case will be decided pursuant to Supreme Court Rule 133(c)(2)(B) (allowing court to rule immediately where oral argument is not requested).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

relevant governmental units of due process while also violating the constitutional separation of powers between the judicial and legislative branches. Actions filed pursuant to the same, including the instant one, are hereby determined to be unenforceable, regardless of the merits.

ANALYSIS OF THE ATTORNEY GENERAL'S BRIEF

In a five-page brief, the Attorney General ignores discussing many of the issues raised by the Court, either failing to examine them in any depth, or altogether ignoring them entirely while suggesting that the glaring deficiencies noted about SB 40 are (1) moot because the Covid-19 disaster emergency expired on June 15, 2021, Doc. 11 at 2 n. 1, or (2) constitutional. For his second argument, the Attorney General makes a two-pronged argument that the Court can ignore the right of the District to complain about due process, because it cannot claim any injury. Alternatively, he justifies SB 40 as an appropriate exercise of legislative rights. None of these arguments are convincing.

I. The MOOTNESS DOCTRINE CANNOT AVOID THE ISSUES IN SB 40.

The Attorney General first argues that the expiration of the Covid-19 pandemic emergency precludes examination of the problems with SB 40. In other words, the case is moot. Principally, those issues include very short "emergency" deadlines,[4] 72 hours for a hearing and 7 days for a decision. The risk is a default judgment without judicial input.[5] There are also significant due process issues.

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[4] Section (1)(c)(2) addresses the 72-hour/7-day deadlines to heard and decide issues:

> Upon receipt of a request under paragraph (1), the board of education shall conduct a hearing within 72 hours of receiving such request for the purposes of reviewing, amending or revoking such action, order or policy. The board shall issue a decision within seven days after the hearing is conducted.

[5] No emergencies have materialized in any of the cases filed in this division (three of them). Rather, they reflect protest petitions. Courts usually have discretion to deal with emergencies. *See, e.g.* K.S.A. 60-903(a)(1) (injunctions).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

For reasons that will be discussed below, the short briefing filed by the Attorney General,[6] who has the burden to show mootness, *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115–16 (10th Cir. 2010), fails to do so. A case is moot when "it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights." *McAlister v. City of Fairway*, 289 Kan. 391, 400, 212, P.3d 694 (2002).

While most judges in this district have heard and ruled upon SB 40 issues[7] within its confines, mindful of the legal stinger in § (d)(1) that defaults the defendant if no ruling occurs within seven days, the same legislative structure exists throughout SB 40.[8] Arguably, only sections 1 and 2 are implicated under the Covid-19 disaster emergency. But SB 40 amends the Kansas Emergency Management Act that impacts future emergencies.

Section 1(a)(1) begins with "[d]uring the state of disaster emergency related to the Covid-19 health emergency described in K.S.A. 2020 Supp. 48-924b, and amendments there to, only the board of education responsible for the maintenance, development and operation of a school district shall have the authority to take any action, issue any order or adopt any policy made or taken in response to such disaster emergency that . . . ."

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[6] The recent reply brief is four and a half pages long.

[7] SB 40 does not define what fundamental rights are at stake. Instead, § 1 (a)(1)(C) identifies anything that "mandates *any action* by any students or employees of a school district while on school district property" that is in response to a pandemic emergency. Thus, the "aggrieved person" in (c)(1) can request a hearing for anything addressed in (a)(1) and force the entire board of education to address the same. So, SB 40 assumes *everything* is some fundamental right that is implicated, which is counterintuitive because such rights are, by definition, limited to justify the strict scrutiny required in (d)(1). Asking someone to wash their hands could trigger a complaint.

[8] § 1(d)(1) (boards of education); § 2(d)(1) (community colleges); §6 (g)(1) (gubernatorial action) ; § 8 (e)(1) (local units of government); § 12 (d)(1) (local health officer determinations).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

Section 2(a)(1), addressing community colleges, has the same language and structure: it states, "[d]uring the state of disaster emergency related to the Covid-19 health emergency as described in K.S.A. 2020 Supp. 48-924b . . . ." Both sections impose identical requirements on the district courts.[9]

Section 6—gubernatorial authority—does not explicitly reference Covid-19. It states: "the governor may issue executive orders to exercise the powers conferred by subsection (c) that have the force and effect of law during the period of a state of disaster emergency declared under K.S.A. 48-924(b), and amendments thereto, or as provided in K.S.A. 2020 Supp. 48-924b . . . ." K.S.A. 48-924(b) contains general gubernatorial emergency powers. Subsection (c) generally references "a state of disaster emergency declared under K.S.A. 48-924..." These changes are not limited by the current Covid-19 crisis.

The District notes that the Attorney General's statement that "SB 40 does not apply to future emergencies" is incorrect for the reasons noted above. Doc. 13 at 10 n.10. It allows for "a new state of disaster emergency to be declared in 2021 and could be amended to extend into future years. *Id.* Likewise, § 6, states that it applies to *all* future disaster emergencies generally and it contains the same enforcement provisions as §§ 1 and 2 in § (g)(1), using the familiar "[a]ny party aggrieved" language to allow suits that have the effect of "substantially burdening or inhibiting the gathering or movement of individuals..." Similarly, § 8 (local units like cities and counties) and § 12 (local health officials), adopt the same enforcement structure of § 6[10] and they are not

[9] SB 40 does not attempt to expedite appellate court deadlines to review district court decisions.

[10] Also included in SB 40 under § 6 are prohibitions against gubernatorial restrictions on firearms, § (d), or to modify election provisions, § (e).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

similarly limited to the Covid-19 disaster. The immediate impact of SB 40 was recognized by association groups beyond the current pandemic when passed:

> The bill makes several other long term changes to KEMA[11] including changes to the closure of schools, adding a new permanent member to the LCC, creating due process procedures for those aggrieved by school closure orders, executive orders, and orders issued under KEMA by Counties or Cities with a designated emergency disaster plan, modifying the civil penalties for violations of KEMA to add criminal penalties if the executive order mandates a curfew or prohibits public entry into an area affected by a disaster, and modifies certain powers of the County Health officer.

The League News, Vol. 26, No. 11 (March 19,2021) [Newsletter of the Kansas League of Municipalities]. Even the Kansas Legislative Research Department's *2021 Summary of Legislation*, pp. 285-88 (June 2021), makes clear that amendments apply to future disaster emergencies.

The common thread in the SB 40 enforcement provisions, whether for this or any future pandemic (such as the Delta variant), is that, under the guise of giving local governments the authority to address specific pandemic issues, SB 40 actually hobbled local pandemic measures by ensuring that lawsuits would be filed, aided by swift court action. Many local units of government simply capitulated under the pressure.[12] Arguably, if the unconstitutional pandemic provisions in §§ 1 and 2 expire, this does not prevent this from happening again which is an exception to mootness. *Stano v. Pryor*, 52 Kan. App. 2d 679, 683, 372 P.3d 427, 430–31 (2016).

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[11] The Kansas Emergency Management Act.

[12] The primary impact of SB 40, it seems, has nothing to do with local control but, rather, eliminating the same.

https://www.cjonline.com/story/news/coronavirus/2021/04/10/new-law-limiting-local-covid-19-orders-accelerates-restrictions-rollback-kansas-politics-county-city/7153366002/

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

SB 40 also constricts how courts operate, dictating strict and short deadlines that necessarily preempt other cases already on the docket, creating burdens of proof that are not justified by undefined rights and then offering a truncated due process scheme that offers little protections to the defendant. The time frames to hear cases, 72 hours, and then to reach a decision, 7 days, exists at both the school district level and the district court level. At the court level, if a decision does not issue within seven days, the plaintiff wins. It is difficult to fathom what the drafters of SB 40 used as a legal template for this default provision which seems to be unprecedented in the law.

The Attorney General's invocation of the mootness doctrine cannot sidestep the significant due process problems and judicial nullification posed by SB 40. Whether it is this pandemic, a variant that may require another pandemic emergency, or any kind of future emergency, this issue is too important and capable of repetition to be ignored. It fits within the exceptions to mootness where the harms are capable of repetition or involve questions of public importance, *State v. DuMars*, 37 Kan.App.2d 600, 605, 154 P.3d 1120, *rev. denied,* 284 Kan. 948 (2007). Those clearly are at stake here. If, for example, the plaintiffs had raised a constitutional issue or fundamental violation of their rights, then, ordinarily, the Court would address the same to avoid repetition of the harm, even if the events surrounding the same had receded at the time of a hearing.

There is also another harm that is being repeated here, beyond the actual pandemic, and that is the abridgement of the judiciary's ability to operate without legislative interference. It has happened before. *See Solomon v. State*, 364 P.3d 536, 549-50, 364 P.3d 536 (2015) (holding that statute providing for local judges to elect their chief judge improperly infringed on the Kansas Supreme Court's administrative responsibility); and *State v. Buser*, 302 Kan. 1, 12-14, 2015 WL

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

4646663, at *9-10 (2015) (holding that legislative remedies for delay in rendering appellate decisions improperly encroached on judicial power).[13]

The mootness doctrine in Kansas is not jurisdictional; it is rooted in prudential concerns that allow courts discretion, as a matter of policy, to address significant concerns that may arise again. *State v. Roat*, 311 Kan. 581, 587, 466 P.3d 439 (2020).

Accordingly, the Court holds that the mootness doctrine does not bar consideration of SB 40's constitutional infirmities.

II. IS SB 40 UNCONSTITUTIONAL?

The first requirement in any case that may involve declaring a statute unconstitutional is the deference ordinarily required to legislative enactments.

Standard of Review

Normally, if this were an ordinary statute, the Court would be required to defer to the Legislature, presume its constitutionality and resolve all doubts it may have in favor of its validity if it can reasonably do so. *Rural Water District No. 2 v. City of Louisburg,* 288 Kan. 811, 817, 207 P.3d 1055 (2009). Courts, however, are unlimited in reviewing questions of constitutionality because they are issues of law. *Brennan v. Kansas Insurance Guaranty Ass'n,* 293 Kan. 446, 450, 264 P.3d 102 (2011). Even under this standard, the issues cannot be reasonably found to be valid.

Additionally, under Article 3, § 1 of the Kansas Constitution, the Kansas Supreme Court has general administrative authority over all courts in a unified system. In cases where there are fundamental constitutional rights at stake, like due process, and the separation of powers, the

[13] This case may explain why the Legislature failed to require quick appellate decisions in SB 40 cases.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

presumption of legislative constitutionality has been pared back. *Hilburn v. Enerpipe Ltd.,* 309 Kan. 1127, 1131, 442 P.3d 509, 513 (2019) (plurality opinion noting presumption of constitutionality does not apply in cases dealing with fundamental interests under the Kansas constitution). Here, giving deference to a statute, however, does not require the Court to assume blinders as to the effect of the law regardless of the standard of review.

A. The School District's Standing to Show an Injury[14]

The Attorney General initially challenges the District's standing to challenge SB 40. Standing usually means the right to make a legal claim or seek judicial enforcement of a duty or right. *Board of Miami County Comm'rs v. Kanza Rail–Trails Conservancy, Inc.,* 292 Kan. 285, 324, 255 P.3d 1186 (2011).

In this instance, the Attorney General invokes the prohibition of lawsuits by governmental subunits against their state creators to bar standing. Doc. 11 at 3 (citing *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.") A similar principle exists under law. *Gannon v. State*, 298 Kan. 1107, 1133-34, 319 P.3d 1196 (2014) (holding that suing school districts lack standing as "persons" to bring due process or equal protection claim under Section 18 of the Kansas Bill of Rights as political subdivisions).

The District states that the Attorney General "has overgeneralized the rule regarding a local government's ability to assert deprivation of its due process rights." Doc. 13 at 4. The Court agrees. It also argues that "the Kansas Constitution [Article 6, §5] states that local public schools

[14] The Court actually raised the constitutional issues on its own authority.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

"*shall be* maintained, developed and *operated* by locally elected boards." *Id.* at 6 (emphasis supplied). This alone provides the District with standing, it argues.

By raising standing, Doc. 11 at 3-4, the Attorney General opens up " 'one of the most amorphous concepts in the entire domain of public law.' " *Bd. of Cty. Commissioners of Sumner Cty. v. Bremby*, 286 Kan. 745, 750, 189 P.3d 494, 499 (2008) (quoted citations omitted). Sometimes, courts have to decide who are parties entitled to procedures. *Id.* at 755-56 (examining Kansas Judicial Review Act definitions of parties).

SB 40 specifically made subunits of government party defendants and once sued, their entitlements as parties cannot be withdrawn.

> There is a line of Kansas cases which holds that ***subordinate government agencies do not have the capacity to sue or be sued in the absence of statute***. One of the first of these was *Dellinger v. Harper County Social Welfare Board,* 155 Kan. 207, 124 P.2d 513 (1942). There a physician attempted to sue the county welfare board to recover fees for services he provided to indigents. It was determined that county welfare boards created under the provisions of the social welfare act do not, under the general powers given to them by statute, have legal capacity to conduct or defend litigation. See *Erwin v. Leonard,* 166 Kan. 630, 203 P.2d 207 (1949); *In re Estate of Butler,* 159 Kan. 144, 152 P.2d 815 (1944); *Murphy v. City of Topeka,* 6 Kan.App.2d 488, 630 P.2d 186 (1981).

Hopkins v. State, 237 Kan. 601, 606, 702 P.2d 311, 316 (1985) (emphasis added). SB 40 is that statutory foundation to be sued, and, to defend against such suit.

When one examines *Williams*, and *Gannon,* they are easily distinguishable. *Williams* involved a federal equal protection claim *against* the state. The *Williams* progeny has it limits. It does not prevent federal suits under the Supremacy Clause or where the source of the governmental subunit's authority is not federal. *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628 (10th Cir. 1998). *Gannon* likewise involved a long-running series of school district lawsuits against the state over inadequate school funding. There, the plaintiff school districts sought to assert, *inter alia*, an equal protection claim *against* the state (under § 18 of the Kansas Constitution's Bill of

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

Rights [the state equivalent to the Fourteenth Amendment]) in seeking affirmative funding relief. The *Gannon* court held this path for relief was not available under the subunit prohibition, 296 Kan. at 1133, but otherwise addressed a claim under Article 6 of the constitution when the districts advocated their rights under that constitutional provision. *Id.* at 1134.

> The State argues that the plaintiff school districts lack standing because they did not suffer a cognizable injury under Article 6, Section 6 of the Kansas Constitution. But the plaintiffs contend in their response brief and maintained at oral arguments before this court that the State's violation of Section 6(b) harmed the districts by significantly undermining their ability to perform their constitutional duties required under Section 5.

298 Kan. at 1127. The court then allowed that claim.

There are other examples of school districts appropriately suing to protect their constitutional sphere of operations.

> Here, the State Board contends that USD 443 has no standing, since it is created by the legislature as a political subdivision of the State, to challenge whether the State impaired a contract with USD 443. ***U.S.D. No. 380 v. McMillen, 252 Kan. 451, 845 P.2d 676 (1993), however, permitted U.S.D. 380 to challenge whether it was denied the protection of the Kansas Constitution even though it was a political subdivision*** of the State. Therefore, although a school district's duties are not self-executing, but dependent upon statutory enactment of the legislature, this does not mean that the school district is stripped of the right to challenge the statute's constitutionality, nor is it removed from the protection of the constitution.

Bd. of Educ. of Unified Sch. Dist. No. 443, Ford Cty. v. Kansas State Bd. of Educ., 266 Kan. 75, 83, 966 P.2d 68, 77 (1998) (emphasis added). School districts serve a constitutional and a statutory role in our state's legislative scheme.

> We have said " '[t]he respective duties and obligations vested in the legislature and the local school boards by the Kansas Constitution must be read together and harmonized so both entities may carry out their respective obligations.' " *U.S.D. No. 229,* 256 Kan. at 253, 885 P.2d 1170 (quoting *McMillen,* 252 Kan. at 464, 845 P.2d 676). ***And when these constitutional provisions are in conflict, legislative action encroaches on the school board's authority when " 'it unduly interferes with or hamstrings the local school board in performing its constitutional duty to maintain, develop, and operate the local public school system.'*** " 256 Kan. at 253, 885 P.2d 1170 (quoting *McMillen,* 252 Kan. at 464, 845 P.2d 676).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

298 Kan. at 1128 (emphasis added). SB 40 encroaches on school district operations.

Because SB 40 allows political subunits to be sued, they are entitled to the same process as other parties and should not be impaired in their respective rights. The dispute over mask policies underlying SB 40 (or other pandemic measures) is not one in which the Court may take sides. But it is noteworthy that SB 40 uses a "strict scrutiny"[15] burden of proof to narrow the District's general authority to operate schools during the pandemic as a matter of public policy. SB 40, however, fails to define these "rights." It assumes them.

The "hurry up" and decide time frames that attend this process, both at the school district level and then at the district court level, are a concern for due process.[16] This expedited procedure spawned a local court rule requiring a lightning quick verified response within 24 hours[17] that was intended to avoid defaults. Ultimately, parties need time to prepare their claims and defend against the same. Speed cannot be the determining factor.

> Litigants must have some effective means to vindicate injuries suffered to their rights without being shut out of court. See *Christopher v. Harbury*, 536 U.S. 403, 415, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002). In other words, individuals are entitled to their "day in court." See *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 1948); *Terrell v. Allison*, 88 U.S. (21 Wall.) 289, 292, 22 L. Ed. 634 (1874); *Jackson v. City of Bloomfield*, 731 F.2d 652, 655 (10th Cir. 1984). The expeditious disposition of cases does not supersede

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[15] In § (d)(1), it states that "[t]he court shall grant the request for relief unless the court finds the action taken, order issued or policy adopted by the board of education ***is narrowly tailored*** to respond to the state of disaster emergency ***and uses the least restrictive means*** to achieve such purpose." Emphasis added. *See Hodes v. Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 662, 440 P.3d 461 (2019) (finding strict scrutiny to examine attempt to regulate abortion rights held to be protected under state constitution and enjoining enforcement of SB 195).

The Supreme Court applied the strict scrutiny test to strike down the New York governor's executive order that placed a 10-person religious attendance requirement in *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020), ***even though it said there was a compelling state interest in stemming the spread of Covid-19***. It found the fundamental right under the free exercise clause of the First Amendment required any such restriction to be "narrowly tailored" by using the "least restrictive means" available. *Id.* (emphasis added).

[16] Even in protection from abuse cases the defendant is allowed 21 days to respond to allegations against them before a final judgment is entered. K.S.A. 60-3106.

[17] Tenth Judicial District Administrative Order No. 21-01 requires a verified response within 24 hours from the time of service of the verified petition.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

> " 'one's fundamental right to his full day in court.' " *Frito-Lay, Inc. v. Morton Foods, Inc.*, 316 F.2d 298, 300 (10th Cir. 1963).
>
> This court has expressly recognized that a party has "the right to a day in court." See *In re Massey*, 56 Kan. 120, 122, 42 P. 365 (1895).

311 Kan. at 591. While the foregoing applies to "individuals," it also applies to the District.

The Attorney General justifies the automatic default provision as "allowable because school districts as government entities, *are not entitled to the same due process rights* as private litigants." Emphasis added. Doc. 11 at 5. This standing argument fails, however, because a Court cannot selectively distinguish between the parties before it as to which are entitled to invoke its procedures. Once made a defendant in a civil action,[18] one becomes a "party." *See* K.S.A. 60-212(b) (referencing defenses "a party" may assert to a claim for relief).

The KANSAS CODE OF CIVIL PROCEDURE[19] is imbued with the same protections and processes for all parties and its provisions "shall be liberally construed, administered and employed by the court ***and the parties*** to secure ***the just***, speedy and inexpensive determination of every action and proceeding." K.S.A. 60-102 (emphasis added). Speed is a conjunctive component that follows "just."

The Attorney General's reply brief cites the recently issued case of *Baker v. Hayden*, ___ P.3d ___, 2021 WL 2766413 (Kan., July 2, 2021), for the proposition that even if standing existed, it is now gone because circumstances have changed. Doc. 18 at 2-3. That case involved the same plaintiff and counsel involved in two out of the three SB 40 cases filed in this Court's division. The court addressed an open meeting act request for recordings from court proceedings that were

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[18] SB 40 § (d)(1) specifically refers to the parties who may file and defend against a "civil action" against a school district. Even this has been ignored by various plaintiffs who seek to sue individual school board members, the superintendent of schools, etc. Such individuals are not "parties" under SB 40.

[19] In most respects, our code is identical to the FEDERAL CODE OF CIVIL PROCEDURE.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

not official records, that court reporters argued would supplant their role and that also could violate attorney-client communications overheard in such proceedings. *Id.* at * 3. But Baker also ended up getting the records during the appeal. *Id.*

In a sharply divided 4-3 decision, the majority opinion opted to find that it no longer had "jurisdiction" over the case because the object of the appeal had been obtained. Critically, the court said Baker had not alleged any additional basis for standing, such as being subjected to illegal violations in the future. 2021 WL 2766413, at *9. The court said Baker had the burden to show standing but failed to do so. *Id.* at *6. It found, therefore, that the facts supporting standing had changed even though it existed when the case was first filed. *Id.* A *de facto* or ongoing policy issue to show standing had not been alleged. *Id.* In this respect, then, standing is jurisdictional, the court said. *Id.* at * 4 (citing *Gannon v. State*, 298 Kan. 1107, 1122, 319 P.3d 1196 (2014)).[20]

The short answer to the split decision in *Baker*, is that SB 40 has not disappeared and neither have the alleged constitutional violations posed by it. The Court holds *that this case* is dismissed because SB 40 is unenforceable and not only because the plaintiffs failed their burden of proof. Likewise, the School District has alleged that the due process violations under SB 40 reoccur should another emergency arise, which is foreseeable. The Court concludes that the District has standing to challenge the constitutionality of SB 40.

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[20] Interestingly, the dissent in *Baker* noted the court had recently reconciled the mootness doctrine to allow exceptions to jurisdictional challenges by finding the doctrine is developed on a prudential basis, allowing a mootness issue to retain jurisdiction. *Id.* at *12. Justice Biles suggested the majority had overruled *Roat* in this respect. 311 Kan. at 590, 466 P.3d 439. *Id.*

> The doctrine of stare decisis 'instructs that points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised." *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362–63, 361 P.3d 504 (2015). Such adherence to precedent promotes the systemic stability of our legal system. *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 (2004).

State v. Spencer Gifts, LLC, 304 Kan. 755, 766, 374 P.3d 680, 688–89 (2016). Until being expressly overruled, *Roat* remains the most recent precedent to which this Court must comply.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

Even the reply brief, however, fails to address *the Court's separate standing* to raise issues implicating the integrity of the judicial system. Doc. 9 at n. 13 (citing *Tolen v. State*, 285 Kan. 672, 675–76, 176 P.3d 170, 173 (2008), and *State v. Adams*, 283 Kan. 365, 367, 153 P.3d 512 (2007) (addressing a speedy trial issue *sua sponte* to serve the ends of justice or prevent the denial of fundamental rights). The reason it is not addressed is that there is no basis to restrict the Court's standing to do so. The changes to KEMA ensure the courts will be forced to address the same violations of both the separation of powers and litigant due process in any case.

Prudential concerns, accordingly, allow consideration of these issues.

B. <u>SB 40 Encroaches on Judicial Powers and Violates Due Process.</u>

The last argument raised by the Attorney General is that SB 40's deadlines and default provisions do not violate the separation of powers. This ignores *State v. Buser*, 302 Kan. 1, 2015 WL 4646663, **2 (2015), where the Legislature used various statutory provisions to pressure all court levels to meet legislative deadlines for issuing decisions. The Attorney General does not discuss *Buser* at all. Indeed, he sought to have the court withdraw its opinion that declared K.S.A. 20-3301 unenforceable, which the court declined to do.[21] Instead of acknowledging how *Buser* applies, the Attorney General minimizes it as merely offering "a remedial process that required the court to set an intended decision date." Doc. 11 at 4. Rather, it directed compliance through many "shalls" that are evident.

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[21] Because the supreme court decided *Buser* as the result of an attorney's motion in that case, the Attorney General was not invited to intervene to support the legislative enactment involved. However, Attorney General Derek Schmidt later sought to have the court withdraw this order because he contended the Mitchell County attorney failed to inform him of the motion raising the invalidity of K.S.A. 20-3301. The court found no justifiable basis for either allowing late intervention or for withdrawing its opinion. *See State v. Buser*, 302 Kan. 15 (Kan. Ct. Sept. 25, 2015) (unpublished).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

Next, the Attorney General suggests that SB 40 is protecting school children. But, as the District points out, it did precisely the opposite:

> This attack came at a time when school boards and school administrators were in desperate need of support from the State to make it to the finish line of an incredibly challenging school year while maintaining the trust of their community to keep students and staff safe and not to give in to the exhaustion caused by "holding the line" on prudent and recommended safety measures. Instead of focusing on how it could provide support to public schools and their students and employees, the State legislature succumbed to the politics of COVID-19 and passed a bill that caused: (a) schools to divert attention from critical student, staff, and operational issues to SB 40 hearings; and (b) that spurred fear of safety measures being prematurely withdrawn or judicially voided.

Doc. 13 at 2, n.2.

The Attorney General justifies the default provision in § (d)(1) by first as assuming that if a court is unable to reach a decision within seven days of a hearing "that [this] suggests the restrictions are questionable at best and the Legislature has reasonably determined that the restrictions should be set aside in those circumstances." Doc. 11 at 5. He then argues that allowing "questionable restrictions to remain in effect for a prolonged period would have the effect of a judgment against the students who are challenging the restrictions." *Id.* This, he argues, is a "*de facto* win for school districts based on delay." *Id.*

Reacting to this, the District says there is no "win" at all because the District was forced to successfully defend an SB 40 case, and its operational procedures, during an unprecedented global pandemic. SB 40, it says, posed an "unreasonable burden that serves to benefit no one, including the 'school children' cited by the Attorney General." *Id.* Rather, the District argues, "[t]he best interest of students, and student rights, is not addressed anywhere in SB 40. The sole focus of Section 1 of SB 40 is adult, political concerns." *Id.* at n. 3.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

The Attorney General says SB 40's default provision is similar to the automatic dismissal of criminal charges for speedy trial violations by the state. Doc. 11 at 5. The analogy drawn between the incarcerated defendant languishing in jail and awaiting trial and school children is ironic. But schools are not penal institutions. School boards are not jailers. And being required to wear a mask to protect others is not the equivalent of a prison sentence.

SB 40 essentially allows a hurried declaration of important legal rights, or allows a default declaration that lacks any judicial input. The District points out that SB 40 contains no requirement that a plaintiff show some individual harm but shifts the burden onto the District to show otherwise. Doc. 13 at 7. Ordinarily, a plaintiff is required to plead some right that has been infringed upon. But SB 40 simply assumes that so long as a person is "aggrieved" by anything it triggers a right to a hearing and immediate decision. SB 40 displays no rigor to identify any fundamental right. It assumes everything related to a complaint about pandemic mitigation effort qualifies. The burden then shifts to the defendant to show otherwise.

This legislative scheme then dangles a default as the ultimate stick, that would allow unchallenged relief sought by any plaintiff to strike down and declare carefully calibrated school operational policies to be void if the judge does not react quickly enough. SB 40 never limits the potential parade of legal complaints that may essentially be asking for the same declaration of rights. There already are procedures for this. K.S.A. 60-1706 (power to issue declaratory relief), by which all interested parties may be allowed to intervene. *See* K.S.A. 60-1712 (allowing all parties to be joined). SB 40 seeks to supplant this act without expressly stating so.

The Attorney General's justification for the default provisions assumes that delays in reaching decisions makes them automatically "questionable" to justify the same. Doc. 11 at 5.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

That is a fantastical legal argument. The validity of any decision is not measured by expedience. Delays in cases are often orchestrated by the parties or overreaching requests.

Scott Bozarth, for example, sought all documents justifying the mask policy, all health expert determinations, communications, reports, etc. The petition references 21 U.S.C. § 360 bbb-3, a Federal Register reference adding Covid-19 to the list of life-threatening diseases (justifying emergency use authorizations), a letter dated 4/24/20 from the chief scientist of the Food and Drug Administration (referencing face masks EUAs), a copy of the Nuremberg Code of 1947 (related to permissible medical experiments[22]) and communications from the plaintiffs challenging mask use and their scientific efficacy. If forced to comply with this request for everything, it would take time.

At the hearing, Mr. Bozarth was succinct in presenting his arguments, albeit ones the Court found unconvincing. Such cases, however, cannot be compressed into seven-day super dockets. While Mr. Bozarth primarily opposed the existing mask policy, other cases present judicial challenges. A case in point is *Baker et al., v. Blue Valley School District, et al.*, Case No. 21CV1942, removed from this division's docket to federal court. (Docs. 25, 26).[23] After the plaintiffs, represented by counsel, sought a remand (return) to state court, the federal court had difficulty determining what exactly the plaintiffs were seeking and against whom. Judge Teeter's order issued on June 23, 2021, more than seven days after the May 6 removal, is instructive.

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[22] The court in *Machovec v. Palm Beach County*, 310 So. 2d 94, 947 (Fla. 4th Dist. Ct. App. 2021), rejected a similar claim under a mask mandate. It commented that requiring someone to wear a mask to prevent the transmission of a disease does not implicate any viable constitutional right, much less one to refuse "medical treatment." The court reviewed the mask mandate there pursuant to injunction standards. K.S.A. 60-901 *et. seq*, addresses injunctive relief.

[23] Federal law allows a defendant in state court to literally remove a case from state to federal court by simply filing a notice of removal within 30 days of getting served. 28 U.S.C. § 1441(a). The state court is then precluded from proceeding further. 28 U.S.C. § 1441(d).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

The Court has carefully reviewed Plaintiffs' petition. It is 50 pages and includes 206 numbered paragraphs, as well as other unnumbered narrative paragraphs. There are 24 Plaintiffs asserting 10 claims against 24 Defendants, though only some Plaintiffs sue some Defendants on any given claim. Some claims are ostensibly alleged against multiple Defendants, but only seek relief as to one. See, e.g., Doc. 1-1 at 43 (Equal Protection claim against both Olathe Defendants and Blue Valley Defendants, but only seeking relief based on Blue Valley Defendants' allegedly unequal treatment). One count seeks injunctive relief, presumably against Blue Valley Defendants and Johnson County Defendants, but does not identify the legal basis for the requested relief. See id. at 37. Two other claims make vague assertions of violations of the "right to privacy" or "student privacy," without clarifying what law the claim is based on, and without asserting what relief is sought. Id. at 21-26.

Additionally, the claims span a wide array of topics, including the school districts' mask policies, the procedures for hearing grievances under SB40, open-records violations, religious freedom, and special-education policies. While all these claims ostensibly have a shared current of dissatisfaction with school policies, Plaintiffs' kitchen-sink approach to pleading has made it particularly difficult for the Court to evaluate whether the state claims form part of the same case or controversy or "derive[ ] from a common nucleus of operative fact," *Price v. Wolford*, 608 F.3d 698, 702-03 (10th Cir. 2010) (internal quotation omitted), as the federal claims, which is the first step in determining whether the Court has supplemental jurisdiction. Finally, many of the paragraphs include multiple sentences, and the petition includes considerable commentary and legal arguments that serve little purpose other than to muddy the waters and garner attention.

While complex pleadings are certainly not unheard of in federal court, it is not job of the Court or the opposing party to sort through a pleading to try to construct a plaintiff's claims. *Schupper* [*v. Edie*], 193 F. App'x [745] at 746 [(10th Cir. 2006)]; *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996) ("Prolix, confusing complaints such as the ones plaintiffs filed in this case impose unfair burdens on litigants and judges."); *U.S. ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003) ("Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud."). Further, unnecessary "[p]rolixity of a complaint undermines the utility of the complaint." *Baker v. City of Loveland*, 686 F. App'x 619, 620 (10th Cir. 2017). Ultimately, "[s]omething labeled a complaint but written more as a press release, prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint." *McHenry*, 84 F.3d at 1180. A complaint masquerading as a press release is an apt description of the petition here.

Terri E. Baker, et al. v. Blue Valley School District, USD 229, et al., No. 2:21CV2210-HLT-TJJ, 2021 WL 2577468, at *5 (D. Kan. June 23, 2021) (emphasis added).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

In Johnson County, a full complement of civil judges may be able to field claims and preempt other emergent civil cases to avoid the default allowed by the act, but other districts with one or fewer judges may be challenged by such claims. But as *Amicus* LAF points out, there may be numerous reasons a judge may not be able to get a decision out in seven days, whether there are more emergent cases, an unforeseen calamity or even the ability to research and issue a reasoned opinion. Doc. 16 at 5. Some districts have only one judge, who must handle every kind of case, family, civil, probate or criminal cases.

Noting the district court's local rules, the District says that Local A.O. No. 21-01 attempts to fill in SB 40's many gaps but that it cannot "prop up a deficient statute [or] a constitutional wrong." Doc. 13 at 7-8. Cases and controversies are not always cut and dried. They may involve a fair bit of the hyperbole that attends litigation, and judges must sort through the same or face the arguments that the plaintiff wins by default, which is not a hypothetical case.[24]

In *Buser*, K.S.A. 20-3301 imposed court decision release deadlines for every level of the judiciary. K.S.A. 20-3301(a)(1) (120 days district court judges); K.S.A. 20-3301(b) (180 days court of appeals judges); and K.S.A. 20-3301(c)(2) (180 days supreme court justices). These mandatory "shalls" were accompanied by various shaming levers to require the chief judges or the

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[24] Indeed, in *Baker*, the plaintiffs' reply brief on the motion to remand, Doc. 17 at 9 in Case No. 2:21CV2210-HLT-TJJ, outlines the precise rationale that threatens due process that is posed by SB 40:

> ***SB40 has what is otherwise a 10 day self-executing drop dead date – if no ruling issues within the 72 hour plus 7 day window, plaintiffs win.*** Nothing suspends those deadlines. That drop dead date has passed. **Plaintiffs win on their SB40 claims**. Those deadlines cannot be altered by a district court and cannot be waived by the parties. SB40 is a statutory procedural requirement that is also substantive. SB40 does not acknowledge a motion to dismiss. SB40 further states that a lower court must render a ruling within seven days. "If the court does not issue an order on such petition within seven days, the relief requested in the petition shall be granted." ***The Kansas legislature was aware of the civil rules of procedure when it created its SB40 cause of action.***

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

chief justice to insist their colleagues issue a decision "without further delay" and further threatening to make these efforts public. This was no "remedial" effort. It was a pressure tactic.

One can imagine the reaction from legislators if courts routinely demanded that a given legislative committee or chamber enact a law or report a bill out of committee within a certain time frame. But in *Buser* the Legislature ordered counsel to do this and counsel refused to do so because of the obvious violation of the separation of powers. 2015 WL 4646663, ** 3. There, counsel cited *State ex rel. Morrison v. Sebelius,* 285 Kan. 875, 883, 179 P.3d 366 (2008), where the attorney general was tasked by the Legislature to have the supreme court pass muster on the constitutionality of the Funeral Privacy Act before it could go into effect. This "judicial trigger" provision was an unconstitutional on its face, seeking an advisory opinion. 285 Kan. at 879-80.

Buser also reminded counsel that, as officers of the court, they were duty bound to follow the Kansas Rules of Professional Conduct to uphold the constitution in accordance with their respective oaths of office per K.S.A. 54-106. 2015 WL 4646663, ** 4 (citing 285 Kan. at 887). In other words, all attorneys, including the Attorney General, are not apologists for unconstitutional legislation.

The separation of powers doctrine means that " 'the legislature makes, the executive executes, and the judiciary construes the law." *State ex re. Morrison,* 285 Kan. at 883 (quoting *Wayman v. Southard,* 23 U.S. (10 Wheat) 1, 46, 6 L.Ed. 253 [1825]). 2015 WL 4646663, ** 1. When one branch strays into another's area of authority, there is a violation.

Article 3, § 1 of the Kansas Constitution grants the Kansas Supreme Court general administrative authority over *all* courts in a unified system. It is exclusive, unambiguous and it allows the court to promulgate rules with the force of law. *State v.* Mitchell, 234 Kan. 185, 194,

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

672 P.2d 1 (1983). District courts must follow supreme court rules. Likewise, all courts adhere to the Rules of Civil Procedure in Chapter 60.[25] But SB 40 negates judicial functions particularly.

> We see then the judicial function falls into two categories: the traditional, independent decision-making power and the rulemaking authority over administration and procedure. The power to make decisions cannot be delegated to a nonjudicial body or person, even with the consent of the litigants. See 16 Am.Jur.2d, Constitutional Law § 311, p. 830. 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.*

State v. Mitchell, 234 Kan. 185, 195, 672 P.2d 1, 9 (1983). The haste by which SB 40 was passed demonstrates no collaborative effort with the judiciary or even promulgated rule-making with input from rank and file judges, even though the supreme court sought to provide some immediate structure to anticipated claims, as did this Court's administrative order.[26]

This is demonstrated by the numerous instances where enforcing SB 40 would violate existing rules. One is Kansas Supreme Court Rule 166(a), requiring decisions on civil motions within 30 days after submission, or, 90 days on other civil matters. Rule 166(b). SB 40 is a civil action. It is a judge-tried case without a jury, and, in such instances Supreme Court Rule 165 requires a judge to list the facts and the principles of law that result in a judgment. A party only "wins" when a court outlines the facts and law that justifies the same.

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[25] The rules of civil procedure are an example of a *cooperative* promulgation of rule between the legislative and judicial branches.

[26] A.O. 2021-RL-032 (filed 4/13/21), sets out emergency rules of procedure and suggested forms for SB 40 actions without any termination date and was signed by the chief justice as being authorized by SB 40. It states, however, that "[t]hese emergency rules should be read in conjunction with other applicable rules, statutes, and Supreme Court Administrative Orders. But these rules control if any provision of (a) Supreme Court rule or order or (b) district court rule or order conflicts with these rules." Nothing in this rule addresses the existing conflicts that now are obvious under SB 40 with both Supreme Court Rules or the rules of civil procedure.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

When a party truly is in default, because it has failed to respond to a lawsuit, even then, K.S.A. 60-255(a) requires *a party* to actually be in default and only then may the opposing party request that the court enter a default judgment. Normally, the state and its agencies are not subject to any default unless established by evidence *that satisfies the court*. K.S.A. 60-255(c).

But SB 40 would repeal all these rules by implication (which the *Baker* plaintiffs noted), which is not favored in the law. *Marshall v. Marshall*, 159 Kan. 602, 607, 156 P.2d 537 (1945). It allows both damage and declaratory relief by a self-executing judgment in violation of K.S.A. 60-1704, which solely gives the district court the power to declare the rights of legal relations between parties. It evades and negates settled procedural and substantive law.[27]

Given the opportunity to explain *Buser*, the Attorney General deflects with no analysis. *Buser* observed that "an unconstitutional 'usurpation of powers exists [only] when one branch of government significantly interferes with the operations of another branch.'" 2015 WL 4646663, **5 (quoting *Miller v. Johnson*, 295 Kan. 636, 671, 289 P.3d 1098 (2012)). It bears repeating what *Buser* says:

> To determine whether a significant interference has occurred, we consider: "(1) the essential nature of the power being exercised; (2) the degree of control by one branch over another; (3) the objective sought to be attained; and (4) the practical result of blending powers as shown by actual experience over a period of time." 295 Kan. at 671, 289 P.3d 1098 (citing *Sebelius,* 285 Kan. 884). We will apply these four *Miller* factors to each of the alternative remedies required of the court in K.S.A.2014 Supp. 20–3301(c).

2015 WL 4646663, *5.

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[27] Judge Teeter referenced SB 40's "highly unusual" procedures, short deadlines and default provision, as justifying an exception to the removal waiver rule that ordinarily finds a party has waived the right to remove a case when the party has filed a pleading in the underlying court. 2021 WL 2577468, at **2. Blue Valley School District, she said, "had very little time <u>at all</u> to assert any defenses." *Id.* (emphasis in original).

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

Examining these factors, the *Buser* court held that the power to decide cases within *any* time deadline is exclusive to the supreme court, not the Legislature. *Id.* at 7. Taking away the power of a court to decide *when* a judicial decision issues interferes with "a sphere of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, to divest [a court] of its absolute command within [this sphere] is to make meaningless the phrase judicial power.'" *Id.* at **6 (quoting *Coate v. Omholt,* 203 Mont. 488, 493-94, 662 P.2d 591 (1983)). *Buser* agreed with the Montana court that "[t]he power to determine when a court renders its decisions is essential to the basic judicial power 'to hear, consider and determine controversies between rival litigants.' " 2015 WL 4646663, ** 6.

Considering the second *Miller* factor, the degree of control by one branch over another, *Buser* said that most all jurisdictions (except Oregon) have concluded that legislative imposition of judicial decision deadlines was unacceptable. The reason for this is that in achieving speed to meet an arbitrary legislative deadline, the courts sacrifice protections against an arbitrary decision and the legitimacy of the courts' decisions suffer. *Id.* at ** 6-7. SB 40 seeks speed at all costs and imposes decision deadlines that violate existing court rules.

The third *Miller* factor addressed, the objective to be sought by a mandatory court-deadline, the court said, was implicated because attempts to expedite the judicial process, reasonable or otherwise, undermine the court's administrative policy. While a legislative objective of asking the court to release its decision was a "worthwhile objective," the court said, it remains that the Legislature cannot force on the judiciary an obligation that it owes directly to the people. *Id. at* **7. The fourth *Miller* factor, the practical result of blending powers as shown by actual experience over a period of time, the court said, was neutral "because we have no experience with the practical result of this type of legislative provision." *Id.* at **7.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

Examining all four factors, the court said that it had reached "the unescapable conclusion that the mandatory court-deadline remedy contained in K.S.A. 2014 Supp. 20-3301(c)(3) violates the separation of powers doctrine. *Id.* at **7. Likewise, this Court reaches the same inescapable conclusion about SB 40. It seeks to speed up or ignore judicial discretion or even decisions. It denies a defendant due process. It ignores existing civil procedures and supreme court administrative rules, it threatens non-compliance with a potential default judgment and it negates judicial input or discretion regarding such default.

Up to this point, the five civil court divisions in this district have handled all SB 40 cases.[28] A local rule was issued to anticipate the procedural gaps in SB 40 to afford basic due process. But the judiciary need not be mindful of an unconstitutional outcome and, thereby, accede to the same. If left unchecked, this pandemic or the next one will result in judgments by omission, undermining judicial integrity and the public's trust in the judiciary. It also would shift power to the Legislature to create a species of self-executing decree that evades judicial determination.

> Various courts have recognized, as these law review authors state, that "certain judicial functions require that the courts alone determine how those functions are to be exercised." 203 Mont. at 493, 662 P.2d 591. See also *In re Enforcement of Subpoena,* 463 Mass. 162, 171, 972 N.E.2d 1022 (2012) (judicial "independence means freedom from every form of compulsion or pressure.... The moment a decision is controlled or affected by ... any form of external influence or pressure, that moment the judge ceases to exist"; external influence or pressure is inconsistent with the value placed on conscientious, intelligent, and independent decision-making).

2015 WL 4646663, ** 9. The Legislature should stay out of a court's decision-making process which "is crucial because the only power of a court 'if such it may be called, is the power of

[28] Thus far, only Divisions 6 and 7 have been assigned cases and one has been removed.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

judgment, *i.e.*, the final product of that decision-making.' " *Id.* (quoting *United States v. Butler*, 297 U.S. 1, 62-63 (1936)).

While *Buser* notes statutory exceptions to legislative time restrictions that are ordinarily barred, such as in eminent domain appeals[29] that take precedence over other cases, K.S.A. 26-504, or in expediting child- in-need-of-care cases, K.S.A. 38-2273(d), 2015 WL 4646663, **10, it found that time restraints on the judiciary that demand compliance fall outside of these exceptions and SB 40 is no exception.

In every respect, then, all lawsuits against cities, counties, school districts, the governor, etc., any aspect of government, are linked in SB 40 to the same tainted enforcement scheme. It is the ultimate legislative stick intended to goad and/or supplant judicial rules and functions and it promotes the equivalent of legal anarchy.

SB 40 does contain a severability clause in § 14 to prevent the invalidity of other portions of the act if any portion of the same is declared unconstitutional or invalid. But here, the enforcement provisions *are* the Act. They are integral to the entire legislative scheme. Although given a chance to address this, Doc. 9 at 19-20, the Attorney General did not respond.

SB 40 uses the same strict scrutiny standard[30] throughout the act. But its reach goes beyond the emergency that ended on June 15 because it amends the Kansas Emergency Management Act for future emergencies, retaining the offensive provisions. Because SB 40 disregards the traditional role of the judiciary, it cannot be severable from these other provisions. *See State ex*

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[29] Eminent domain proceedings are not civil actions covered by the code of civil procedure. *Sutton v. Frazier*, 183 Kan. 33, 37, 325 P.2d 338, 343 (1958).

[30] This same standard is imposed against the governor under § 6(g)(1), against all local governments under § 8(e)(1), and against all county health boards, § 12(d)(1). They all have the same default provision and deadlines.

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

rel. Morrison, 285 Kan. 875, 913 (finding that severability was not possible because judicial trigger provision in the act itself answered the severability question).

Accordingly, the Court finds that SB 40 is unenforceable through its enforcement provisions because it violates the separation of powers and it deprives the defendant of required due process.

The Court determined at the hearing of this matter that neither of the plaintiffs' children were required to wear masks. In Ms. Butler's case, her children had an exemption. In Mr. Bozarth's case, he chose not to obtain an exemption, preferring to attack the mask policy directly. They have not offered any new evidence to alter the Court's previous determination but even if they had, the act is unenforceable. The Court is not critical of any parent who feels strongly that government action might be regarded as arbitrary or even harmful to one's child. But there are existing legal procedures to address such potential violations without depending on the violation of other equally important rights.

This matter is, therefore, dismissed with prejudice in favor of the defendant, and SB 40 is declared to be unenforceable for the reasons outlined in this order.

IT IS SO ORDERED.

7/14/21 /s/ David W. Hauber

DATE DISTRICT COURT JUDGE, DIV. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60 258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e mail addresses provided by counsel of record in this case and any self-represented parties.

/s/ DWH

Clerk of the District Court, Johnson County Kansas
07/15/21 08:33am ML

EXHIBIT C

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

BUTLER, KRISTIN, and BOZARTH, SCOTT,

Plaintiffs/Petitioners

Case No. 21CV2385

vs.

Chapter 60; Division 7

SHAWNEE MISSION SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant/Respondent.

ORDER DENYING REQUEST FOR STAY

The Attorney General has filed a motion pursuant to K.S.A. 60-262, to stay the effect of this Court's final order, Doc. 19, declaring unconstitutional SB 40. Doc. 20. This request for a stay has been filed pursuant to a notice of appeal directly to the Kansas Supreme Court.[1] Doc. 21. Oral argument on this motion was conducted on July 27, 2021. The Court denies the Attorney General's motions for the reasons outlined below.

The Request for Stay

The Attorney General's motion cites K.S.A. 60-262(e) as authority for granting a stay on appeal. That provision, a subsection of K.S.A. 60-262, which is entitled ***Stay of Proceedings to***

[1] K.S.A. 60-2101(b) provides:

> The supreme court shall have jurisdiction to correct, modify, vacate or reverse any act, order of judgment of a district court or court of appeals in order to assure such act, order or judgment is just, legal and free of abuse. An appeal from a final judgment of a district court in any civil action in which a statute of this state or of the United States has been held unconstitutional shall be taken directly to the supreme court.

Clerk of the District Court, Johnson County Kansas
07/27/21 02:37pm MM

***Enforce* Judgment,** is inapplicable. Subsection (e) simply provides that the state does not have to post a bond during an appeal. There is no judgment requiring a bond or otherwise. Despite this, the Attorney General argues that the Court's July 15, 2021, order has created confusion that "will persist and *potentially hamper* the State's ability to respond to *a future disaster emergency*, inviting the very sort of 'legal anarchy' that troubled the court." Doc. 20 at 2 (emphasis added). As noted at oral argument, the Attorney General's argument is speculative. If there is any confusion it is rooted in SB 40. The Court restored the baseline constitutional rights of the District that was hampered by SB 40's enforcement provisions.

Additionally, the Attorney General asserts that the Court's "opinion broadly declares that all of SB 40 is 'unenforceable.' But there are many provisions of SB 40 unconnected to the challenged judicial review process. For instance, Section 3 of SB 40 adds the Vice President of the Senate as an eighth member of the Legislative Coordinating Council." He goes on to note that there is no reason this cannot be severed from the Court's ruling. *Id.* There is no "severance" provision in K.S.A. 60-262,[2] partial or otherwise.

The Court inquired of the Attorney General's representative, solicitor general, Brant Laue, as to why the Attorney General failed to address the severability argument, when given an opportunity to do so on the primary briefing. His response, during oral argument, essentially, was that the Court's constitutionality concerns were off the mark.

> We felt that the arguments concerning the unconstitutionality of SB 40 were frankly so poor and so overwhelmingly in our favor and we also felt that the mootness issue which had to be dealt with initially, and we think the supreme court will deal with initially, were so overwhelming that frankly if the statute was not unconstitutional there was no need and we did not think the court would reach the severability issue.

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[2] Severance is an option when a misjoined claim occurs in a lawsuit and the Court is empowered to sever or dismiss the same. K.S.A. 60-221. That is not this case.

Clerk of the District Court, Johnson County Kansas
07/27/21 02:37pm MM

Even when the Court *did reach* the severability issue, however, the Attorney General failed to file a motion to alter or amend the judgment, it seems, because he was supremely confident of the overbreadth of the Court's order, the mootness issue and, therefore, saw no further need to address the same.

At this stage, then, it is clear the Attorney General deliberately avoided addressing the Court on two occasions to address the subject of the stay now being sought, over the speculation that the impact of the Court's decision *might* impact issues other than those addressed in the order. Mr. Laue accurately describes that order as having a declaratory effect but the stay authority he invokes, K.S.A. 60-262, does not address stays of declaratory judgments.

The Shawnee Mission School District ("District"), filed a response's, Doc. 22, which reflects the Court's concerns about the relative harms of a stay:

> The Attorney General has now requested that the Court stay its Order pending appeal, citing a concern that there is "confusion about the validity of other provisions of SB 40 not at issue in this case." The time for the Attorney General to identify specific provisions of SB 40 that he believes should be saved by its severability clause was in his briefing prior to the Court's Final Order, or perhaps in a motion to alter or amend judgment under K.S.A. 60-259(f). Rather than using the proper avenues for requesting a limitation on, or clarification of, the Court's Order, the Attorney General has asked the Court to stay its Order while the appeal process takes place. Even if an expedited appeal process occurs, a decision from the Supreme Court could take several months. Neither the District, nor the other governmental entities subject to SB 40, nor the courts, should be left unshielded from the constitutional violations in SB 40 while the appeal process plays out. Further, the District, as the prevailing party, should not be deprived of the benefit of the judgment in its favor because the Attorney General failed to address other portions of the act in its pre-judgement briefing, and/or to file a post-judgment brief providing arguments and authorities in support of a request for an amended judgment.

Doc. 22 at 2-3.

Clerk of the District Court, Johnson County Kansas
07/27/21 02:37pm MM

The Court invited the Attorney General to specifically address the severability clause, Doc. 19 at 26; Doc. 9 at 19-20. But for the reasons outlined during oral argument, no response was forthcoming. He then failed to file a post-judgment request to alter or amend the judgment pursuant to K.S.A. 60-259(f), even after filing the notice of appeal. Ordinarily, a trial court does not have jurisdiction to modify a judgment after it has been appealed *and the appeal docketed* at the appellate level. *ARY Jewelers v. Krigel*, 277 Kan. 464, 473, 85 P.3d 1151 (2004). But that did not occur either.

The Attorney General's current motion for a stay appears to be a salvage operation. The District accurately interprets the motion as asking the Court to prevent its judgment from being relied upon. Doc. 22 at 3. Of course, a court cannot erase its words. The order also is not an injunction. As noted at oral argument, there are specific provisions that address stays for injunctions, K.S.A. 60-262(a)(1) (stating that injunctions are not stayed) and K.S.A. 60-262(c) (noting a "court may suspend, modify, restore or grant the injunction "on terms for bond or other terms that secure the opposing party's rights.") They do not apply here. Failing to provide the Court with *any* authority beyond K.S.A. 60-262, the Attorney General resorts to suggesting the Court has "inherent power" to issue a stay. But this is not such a case for the Court to exercise if such discretionary power is available.

At oral argument, the Attorney General's representative also acknowledged parroting the Court's description of SB 40 as promoting "legal anarchy" to suggest the Court's order has effected the same on issues never addressed. This turn-of-phrase, however, is apparently intended for some other audience but not a court of law. It also does not consider the baseline constitutional concerns at stake and that were addressed. Any future concerns about the impact of the Court's order and SB 40, lie with SB 40's architects, the Legislature, and, ultimately, the supreme court.

Clerk of the District Court, Johnson County Kansas
07/27/21 02:37pm MM

The District, as the prevailing party, has a right to rely upon the Court's order:

> As to the claim that the District "does not currently suffer any injury as a result of SB 40", the Attorney General seems to be unfamiliar with the incredibly difficult work being done right now by Kansas school districts and their volunteer board members. Students return to school in a matter of weeks, and COVID-19 cases and hospitalizations are increasing. School districts do not have the luxury of viewing pandemic response measures, or the possibility of a new state of disaster emergency and revival of SB 40, as "moot." School boards across the State are facing the daunting and high-pressure task of developing appropriate operating and mitigation plans for the 2021-22 school year , and then updating those plans as needed. At the Shawnee Mission School District's Board of Education meeting scheduled for this coming Monday, July 26, 2021, the Board will discuss and approve a 21-22 Fall mitigation plan. The Board should be able to approve and update a mitigation plan, and update that plan as necessary, with the protection of the Court's July 15th Order and with the assurance that it is shielded from a "potential parade" of SB 40 lawsuits if a new state of disaster emergency is declared.[3]

Doc. 22 at 3-4.

As noted at oral argument, once this Court's judgment was appealed, the motion for stay invoked an ephemeral world in appellate jurisdiction.

> The filing of a timely notice of appeal and docketing of that appeal with an appellate court divests the district court of jurisdiction in the case. ***In the time between the filing of a notice of appeal and its docketing, the district court and appellate court have simultaneous jurisdiction,*** but once the appeal is docketed the district court loses its jurisdiction over the case. At that point, only the appellate court has jurisdiction to change the district court's order.

Matter of Marriage of Brownback, 2020 WL 2296943, * 6, 462 P.3d 202 (Kan. Ct. App. May 8, 2020) (emphasis added). The Attorney General is not without a remedy. He can immediately docket this case and ask the supreme court to address the expressed need for a stay.

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[3] The District, most likely in reliance of the Court's order, recently decided at its board meeting last night to require masking for all elementary students, while making masks optional for middle and high schools.

https://www.kansascity.com/news/local/education/article253036358.html

Clerk of the District Court, Johnson County Kansas
07/27/21 02:37pm MM

In Kansas, the district court retains jurisdiction over the case until an appeal is docketed or a motion to docket the appeal out of time is filed with the appellate court. *Sanders v. City of Kansas City,* 18 Kan.App.2d 688, 692, 858 P.2d 833, *rev. denied* 253 Kan. 860 (1993), *cert. denied* 511 U.S. 1052 (1994).

At this stage, however, the request for stay outlined by the Attorney General cites speculative harm and is not justified. Accordingly, the Court finds no basis for any stay of its judgment. The motion for stay is denied.

IT IS SO ORDERED.

7/27/21 /s/ David W. Hauber

DATE DISTRICT COURT JUDGE, DIV. 7

NOTICE OF ELECTRONIC SERVICE

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/s/ DWH

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07/27/21 02:37pm MM