Case No. 21-124205-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

BUTLER, KRISTEN, and BOZARTH, SCOTT
Plaintiffs,

v.

SHAWNEE MISSION SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee,

ATTORNEY GENERAL DEREK SCHMIDT,
Intervenor-Appellant.

Appeal from the District Court of Johnson County
Honorable David Hauber, District Judge
District Court Case No. 21-CV-2385

BRIEF OF *AMICUS CURIAE* THE KANSAS CHAMBER OF COMMERCE

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I. NATURE OF THE CASE

Per this Court's September 13, 2021 order, the Kansas Chamber of Commerce ("the Chamber") submits this *amicus* brief in support of the Attorney General's defense of SB 40.

II. STATEMENT OF INTEREST BY *AMICUS CURIAE* THE CHAMBER

The Chamber, a body composed of hundreds of Kansas businesses of every size, strives to improve the economic climate for the benefit of each business and citizen, and to safeguard Kansas's system of free, competitive enterprise. It does so by, among other things, supporting its members in legislative and regulatory matters at local, state, and federal levels.

This appeal involves the constitutionality of the Legislature's recent, carefully-crafted amendments to the Kansas Emergency Management Act (KEMA) in SB 40, which permit aggrieved parties to obtain meaningful judicial review of certain governmental emergency actions, including actions like those taken in the latest COVID-related emergency. Through SB 40, the Legislature adopted what it determined was an appropriate process to enable courts to balance the State's compelling interest in ensuring the public health during a pandemic, on one hand, with the fundamental liberties of Kansas citizens and interests of Kansas businesses and their employees, on the other.

The Chamber has obvious and profound interest in the impact of emergency public health orders on Kansas's businesses and citizenry. The Chamber supported the SB 40 amendments to the KEMA through the legislative process, and now urges this Court to uphold the law against the district court's *sua sponte* constitutional attack.

III. BACKGROUND

Before and during the beginning stages of the COVID-19 pandemic, state and local government officials in Kansas were armed with various statutory tools and the then-existing version of the Kansas Emergency Management Act ("KEMA") to attempt to address public health emergencies. *See, e.g.*, K.S.A. §§ 48-904, *et seq.*, 65-202, 65-119, 65-129b. But as the Legislature was informed—when its Special Committee on the KEMA received testimony concerning HB 2016, a precursor to SB 40—as state and local governments sought to implement public health orders in the face of COVID-19, inconsistencies and lack of due process in implementation became patent.[1]

More specifically, testimony was offered that, among other things: various "stay home" orders failed to notify citizens of their right to a hearing within 72 hours under K.S.A. § 65-129c or that employers could not discharge employees under K.S.A. § 65-129d; assessments as to which businesses were "essential" were inconsistent; and counties issued curfew orders, employee-screening requirements, mask orders, warrantless searches, and sports restrictions without specific statutory authority and, when relying on broad catch-all language in K.S.A. § 65-202, cited inapplicable enforcement authority and did not notify citizens of due process rights under K.S.A. § 65-129c. *See* A4.

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[1] *See generally* Ryan Kriegshauser, Sept. 22, 2020 Testimony on the Kansas Emergency Management Act to the Special Committee on the Kansas Emergency Management Act, at Appendix ("A")1-18, *available at* http://www.kslegislature.org/li_2020/b2019_20/committees/ctte_spc_2020_ks_emerg_manage_act_1/documents/testimony/20200922_03.pdf (last visited Sept. 9, 2021).

Business-specific testimony was also provided. Concerning the Governor's "essential function framework," for example, enacted through executive orders, businesses not labeled "essential" were not permitted to operate even in limited or reorganized capacities, despite proposing plans to operate safely. *See* A5. One such business was a company that employed 100 persons, shipping vinyl records and vinyl-record supplies to customers, and which proposed to leave only a single employee working alone in a 30,000 square foot warehouse (the "Record Company"). *See* A6. In its proposal, the Record Company acknowledged that this plan would still "considerably" impact its business, yet said the plan would at least allow the company to continue to operate, and save the jobs of all 100 employees. *See id.* The business, however, was not granted "essential" status, even though its proposed plan minimized any COVID risk, and even as flower and candy shops, for example, were allowed to continue operating. *See id.*

Another company, called The Body Lab, which, among other things, provides wellness and physical health training and certain post-rehabilitation services, sought pre-reopening confirmation from the Kansas Department of Health and Human Services ("KDHE") that it was an "essential" business, under the then-effective executive order framework, but received only a form email response without clarification or affirmation. *See* A9-10. When The Body Lab thereafter announced plans to reopen, a local police department threatened criminal prosecution. *See* A10. The company's counsel reached out to the county counselor but, after receiving no guidance, filed suit and requested a hearing within 72 hours, citing K.S.A. § 65-129c, and arguing that the local health

official could not purport to interpret the Governor's executive order authoritatively without complying with the Kansas Rules and Regulations Filing Act ("KRRFA"). *See id.* Although K.S.A. § 65-129c only expressly applies to and provides for a hearing in the context of isolation and quarantine orders, a hearing was nevertheless granted and the judge acknowledged that there needed "to be some way for people to get the attention of the authorities through some recognized channel." *See* A10-11. After the judge directed the parties to work together to evaluate The Body Lab's safety protocols, the company was able to quickly reopen. *See* A11.

In another case highlighted in testimony before the Legislature, an Emporia restaurant owner received a citation, ordering closure of his restaurant for allegedly operating in violation of Kansas's "Ad Astra" reopening plan, based on a local health department employee's opinion that the cited restaurant was not a "bar and grill" (the "Emporia Restaurant"). *See* A11-12. But "bar and grill" was not a relevant legal term defined in any of the governing or applicable authorities and, had the business been viewed as a "restaurant"—another term for which unambiguous definitions did not exist in controlling authorities—it would have been allowed to continue operations. *See id.* Through counsel, the restaurant moved to dismiss the citation. *See* A11. Faced with the motion to dismiss citing the above-referenced definitional issues, as well as the local health department's failure to provide due process protections before ordering closure, among other problems, the City of Emporia dismissed its citation. *See* A11-14.

A lawsuit was also instrumental in securing revisions to a Linn County Emergency Public Order, which had initially required businesses and professionals to compile and

disclose, on demand and into perpetuity, a list of their patrons, patients, and clients. *See* A14. The federal lawsuit alleged that, in addition to creating doctor-patient and attorney-client privilege problems, the order provided for unconstitutional warrantless searches and seizures. *See* A14-15. After the lawsuit was filed, Linn County's order was revised to make compliance voluntary, and to require that, if compliance was to be compelled, a warrant first be obtained or other judicial process pursued; further, the lawsuit prompted the Kansas Attorney General to seek privacy protections in contract tracing. *See* A15.

Based on these and similar business experiences reflecting that additional and expedited due process protections were needed in emergency scenarios, the Legislature was urged that KEMA should be revised to, among other things, clarify that executive orders issued under KEMA are subject to the KRRFA, and also make emergency orders issued by local health officers and the Governor subject to a 72-hour hearing requirement, similar to that provided under K.S.A. § 65-129c, but without that statute's limited application to isolation or quarantine orders. *See* A17-18. In additional testimony given before the House and Senate in later legislative sessions leading up to SB 40's passage, the Chamber cited and relied on Mr. Kriegshauser's prior testimony and continued to urge and support the above-described revisions, including a strict scrutiny review of any challenged orders, policies, or actions.[2]

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[2] *See* Eric Stafford (Chamber, VP Govt. Affairs) and Ryan Kriegshauser, Feb. 25, 2021 Testimony Before House Judiciary Committee, in Support of HB 2416, at A19-20, *available at* http://www.kslegislature.org/li/b2021_22/committees/ctte_h_jud_1/misc_documents/download_testimony/ctte_h_jud_1_20210225_04_testimony.html (last visited Sept. 9, 2021); Eric Stafford (Chamber, VP Govt. Affairs) and Ryan

The SB 40 version that was ultimately passed provided parties aggrieved by various governmental emergency orders to bring a civil action, in which a hearing is required to be held within 72 hours after filing.[3] After such a hearing, the district court must grant the requested relief unless it determines that the challenged action was "narrowly tailored" and used the "least restrictive means" to respond to the public health emergency and, if the district court does not rule on the challenge within seven days, the plaintiff becomes automatically entitled to the requested relief. *See id.*

In the underlying case here, Plaintiffs Kristin Butler and Scott Bozarth, parents of Shawnee Mission School District students, invoked the new SB 40 civil action and hearing procedures to seek review of the District's COVID mask policy. *See* Dist. Ct. June 8, 2021 Order, at A24, A30-34. The district court ruled that the parents' challenge to the school district's mandatory mask policy was untimely, and also moot because the public health emergency that prompted that particular mask policy had expired. *See id.* at A35-40. The district court also suggested, in *dicta*, that had the parents' challenge been ripe, the school board's masking policy would have satisfied the strict scrutiny review required by SB 40. *See id.* at A36-37. But the district court didn't stop at simply adjudicating the case before it. The court decided to review the constitutionality of SB 40

Kriegshauser, Feb. 25, 2021 Testimony Before Senate Judiciary Committee, in Support of SB 273, at A21-23, *available at* http://www.kslegislature.org/li/b2021_22/committees/ctte_s_jud_1/misc_documents/download_testimony/ctte_s_jud_1_20210225_04_testimony.html (last visited Sept. 9, 2021).

[3] *See* SB 40 (Mar. 25, 2021), *available at* http://www.kslegislature.org/li/b2021_22/measures/documents/sb40_enrolled.pdf (last visited Sept. 10, 2021).

sua sponte because of the scheme's "impact on the judiciary" (*id.* at A37, n.12), and held the law was unconstitutional, yet invited the Attorney General to defend SB 40 in response to the district court's constitutionality analysis. *See id.* at A37-43.

The Attorney General intervened to defend SB 40, to no avail. The district court issued a final judgment in which the court maintained its *sua sponte* analysis that SB 40 was an unconstitutional violation of separation of powers principles and deprived the school district of required due process. *See* Dist. Ct. July 14, 2021 Judgment, A45-71.

This appeal by the Attorney General followed.

IV. ARGUMENTS AND AUTHORITIES

A. The Chamber supports the Attorney General's prudential arguments.

The Attorney General's brief capably develops several prudential reasons why this Court should reverse the district court's decision to *sua sponte* review and determine the constitutionality of a statute, in its *entirety*, in a case in which such constitutional issues were never properly joined, and where the statute contains a severability clause as well as several provisions not implicated by the Plaintiffs' case. *See* A.G.'s App. Br., pp.3-12. Including for the reasons articulated by the Attorney General, it was improper for the court to inject unraised issues—which it had a duty to avoid—into a case in order to resolve concerns about SB 40's perceived or anticipated impacts on the judiciary and separation of powers concerns, even if those concerns had merit (which is not conceded). Indeed, the *primary* rules in evaluating a separation of powers issue require "a court to presume a statute to be constitutional," resolve "all doubts" in "favor of it validity," and if "there is any reasonable way to construe a statute as constitutionally valid, the court

must do so." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 883-84, 179 P.3d 366 (2008). The district court's acknowledgment of, yet failure to apply, these rules—under its view that SB 40 is not an "ordinary" statute—is a threshold error compelling reversal.

B. SB 40's provisions for judicial review of challenges to public health orders are an appropriate exercise of legislative authority.

In our tripartite system of government, the legislative branch is primarily responsible for determining and articulating public policy. *See, e.g.*, *Woodruff v. City of Ottawa*, 263 Kan. 557, 561, 951 P.2d 953, 956 (1997); *Wicina, By & Through Wicina v. Strecker*, 242 Kan. 278, 282, 747 P.2d 167, 171 (1987). It is not the province of the judicial branch to "weigh the desirability of social or economic policy underlying the statute or to question its wisdom; those are purely legislative matters." *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, 760, 408 P.2d 877, 888 (1965).

1. The Chamber concurs in the Attorney General's merits arguments.

The district court took particular issue with the compressed procedures and timelines the Legislature built into SB 40, including the provision that if a court does not rule on a claim within seven days of the hearing, the requested relief is automatically granted. The Chamber again concurs with the Attorney General's responses to these concerns, including because: (1) school districts (and other political subdivisions subject to the law) do not have the same kinds of due process rights that people do; (2) SB 40's so-called default provision, while unusual, is tailored for emergency circumstances and should not be difficult for courts to comply with, because courts can issue preliminary or summary final rulings within seven days, which can be followed by detailed written

opinions in due course; (3) other statutory schemes for emergency situations entail similarly compressed processes, and courts have proven equal to the challenge those compressed processes entail; (4) the timelines the Legislature prescribed impose no sanction on *courts* if unmet, but rather merely grant a plaintiff automatic relief as against the challenged governmental action, and thus concern the Legislature's emergency management limitations prescribed for other governmental actors rather than effecting any encroachment on the judiciary's authority;[4] and (5) the Legislature expressly provided that courts may sever problematic provisions of SB 40 (if any) rather than strike down the entire law as unconstitutional. *See* A.G.'s App. Br., pp. 12-24.

2. The Legislature's policy decisions were otherwise supported by Kansas law and evidence it received.

Once it disposed of Plaintiffs' claims below, no live controversy existed within which the district court could properly have decided its self-raised constitutional concerns. As mentioned, though, the district court nevertheless thereafter purported to declare SB 40, in its entirety, unconstitutional and unenforceable. Thus segregated from its case-specific underpinnings, the district court's ruling was effectively a ruling that SB

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[4] Given the absence of any provision for sanctioning the court, the procedural nature of the 72-hour hearing provision, and the *Morrison* rule that statutes be construed to avoid constitutional issues if reasonably possible (285 Kan. at 883-84), SB 40's use of the word "shall" with respect to the 72-hour hearing provision might fairly be construed as directory rather than mandatory, under this Court's four-factor analysis applied in *Ambrosier v. Brownback*, 304 Kan. 907, 912, 375 P.3d 1007 (2016) (construing "shall" as directory, rather than mandatory, where, among other things, "shall" applied to procedural, rather than substantive, rule, and no consequences were prescribed for noncompliance). So construed, the constitutional impact (if any) of the following seven-day ruling provision is also arguably lessened.

40 is facially invalid—in other words, "that no set of circumstances exist under which" SB40 "would be valid." *See Injured Workers of Kan. v. Franklin*, 262 Kan. 840, 850-51, 942 P.2d 591 (1997).

But in addition to each of the reasons that SB 40 is not constitutionally problematic, summarized in Part IV.B., *supra*, the Legislature's decision was otherwise supported by Kansas law, and evidence, too. As for the former, it has long been the law in Kansas that among "all the objects sought to be secured by government, none is more important than the preservation of the public health; and, an imperative obligation rests upon the state through its proper instrumentalities or agencies to take all necessary steps to accomplish this objective." *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 655, 308 P.2d 537 (1957). In enacting SB 40, the Legislature reinforced the rule declared in *Fadely* that the government's obligation to preserve public health may be fulfilled only by taking "necessary steps" through "proper instrumentalities or agencies." *Id.* Before SB 40 was passed, Kansas citizens and businesses had limited options with which to protect themselves when governmental actors went beyond "necessary steps" or acted outside "proper instrumentalities." Although K.S.A. § 65-129c provided for a hearing within 72 hours of challenged order, for example, its path to relief is available, at least by that statute's express terms, only in limited isolation and quarantine contexts.

Thus the Legislature was presented with testimony supporting the conclusion that similar due process measures had become necessary to support Kansas citizens and businesses in additional emergency contexts, as most recently illustrated by governmental attempts to implement COVID-19 restrictions. And those businesses' experiences

supported the adoption of SB 40's new due process measures, including provisions the district court purported to find problematic.

The Record Company's experience, for example, supported the Legislature's determination that under the then-existing framework, additional safeguards and review standards were necessary to help ensure that government actors took only those steps actually necessary for the protection of the public health, and nothing further. As described in testimony provided to the Legislature, that company was not permitted to operate under a supposed "essential" business framework, despite that candy and flower shops were permitted to operate as "essential," and despite that the Record Company made plans to protect its employees by operating on an emergency basis through a single individual working alone in a huge warehouse. *See* A5-6. Testimony concerning the experiences of businesses and professionals in Linn County, challenging the county's requirement that they compile, maintain, and disclose lists of their patrons and clients on demand (*see* A14-15), likewise supported the Legislature's determination that express standards were necessary to guide and limit governmental actors in enacting and implementing attempted public health measures.

Similarly, testimony concerning the Emporia Restaurant and The Body Lab experiences, supported the Legislature's determination that mechanisms for businesses' ready access to the courts, to address situations other than isolation and quarantine orders, were necessary to quickly obtain review and provide Kansas businesses and their employees relief from arbitrary and ill-supported government enforcement efforts. *See* A9-14.

As this Court's Access to Justice Committee has observed, litigation is often prohibitively expensive,[5] not to mention slow and drawn out. In SB 40, the Legislature deliberately adopted a simple and compressed procedure for adjudication of public health order challenges to prevent such challenges from languishing in court, becoming moot, or costing a fortune to litigate. SB 40's compressed procedures thus have the salutary effect of giving ordinary citizens the ability to obtain real, meaningful judicial review. Again, as in other statutory frameworks, cited in the Attorney General's brief, in which the Legislature has prescribed procedures and timelines within which various matters are to be litigated, it is well within the policy-making province of the Legislature to craft procedures designed to ensure that people get their timely day in court.

Perhaps few circumstances warrant such procedures so much as public health emergencies. Indeed, although the Chamber is mindful that governmental decision-makers in emergency situations do their best to protect the public to the greatest extent possible, emergency decisions are, by definition, made on an emergent basis, and their implementation is likely to be imperfect. Further, history is rife with examples of crises providing fertile soil in which even well-intentioned government overreach takes root. In this State, in which all "political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit" (Kan. Const. Bill of Rights, § 2), the Legislature's provision of due process mechanisms,

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[5] *See* Access to Justice Committee's 2020 Assessment of Self-Represented Litigant Services study, available on the Court's website at https://www.kscourts.org/About-the-Courts/Court-Administration/Access-to-Justice.

by which the people and their businesses and employers may seek ready redress for governmental emergency orders and actions that exceed the means necessary to protect the public health, struck a constitutionally appropriate balance.

3. The so-called default provision can be modified or removed by the Legislature, or severed by the Court, if problematic.

As noted, the district court expressed particular concern over SB 40's so-called default provision, under which a claimant automatically wins if a court does not rule his petition within seven days of the hearing. The district court raised the possibility that claimants might try to take advantage of this mechanism by bringing claims in hopes of winning by default, due to delayed judicial response, rather than on the merits. *See* A40-41.

In addition to the Attorney General's contrary arguments, and even if claimants are indeed able to game the system as the district court was concerned—*e.g.*, resulting in large default judgments or extraordinary equitable relief against State entities—the Legislature can always refine the type of relief that may be sought or obtained through the default mechanism, or eliminate it all together. Alternatively, as the Attorney General outlined, the Court could sever any objectionable provisions.

V. CONCLUSION

This Court should reverse the district court's judgment for the prudential reasons the Attorney General articulated. But if it reaches the merits, it should likewise reverse the judgment and uphold the Legislature's well-considered SB 40 provisions for due process mechanisms by which governmental emergency orders may be challenged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of September 2021, the above and foregoing *Amicus* Brief, and its accompanying Appendix, was electronically filed with the Kansas Supreme Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to the following:

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APPENDIX INDEX

KRIEGSHAUSER LAW

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Testimony on the Kansas Emergency Management Act

Submitted to the Special Committee on the Kansas Emergency Management Act

By Ryan Kriegshauser, Principal, Kriegshauser Law, LLC

Tuesday, September 22, 2020

Chairman Patton, Vice Chair Rucker, and members of the Special Committee:

Thank you for the opportunity to discuss this very important topic with you. As you are aware, the Kansas Emergency Management Act ("KEMA") has been used in unprecedented ways of the past several months. It appears that KEMA was not written with a global pandemic in mind, nor were many of the Chapter 65 public health statutes now being commonly used at the local level.[1] Because of this, the implementation of KEMA and various infectious disease statutes to combat COVID-19 has been lackluster at best. Over the past few months, I have been involved in litigation involving KEMA and orders issued by various local heath officers ("LHO")s. This testimony gives an overview of the cases in which I have been involved and the implications on KEMA and relevant Chapter 65 statutes. These experiences inform the following recommendations:

Bottom Line Up Front - Recommendations

- The legislature should continue the changes made by H.B. 2016;
- Update language in Section 6 of H.B. 2016 to make it broader and consistent with K.S.A. 48-925(e), as described further below;
- Remove "private schools" from Section 7 of H.B. 2016 and treat them similar to any other not-for-profit business;
- Increase due process in long-term disasters as described further below;
- Confront illegal rulemaking by local units of government and agencies;
- Make orders issued by LHOs and certain Executive Orders "EO"s subject to a 72-hour hearing requirement similar to the requirement in K.S.A. 65-129c;
- Require KDHE to maintain a central online repository by jurisdiction of all Chapter 65 LHO Orders currently in effect;
- Provide clarification under K.S.A. 48-933(c) as to what "commandeered or otherwise used in coping with a disaster" means.

[1] Most commonly used are K.S.A. 65-202, 65-119, and 65-129b.

Kansas Public Health Laws

There is no question that the public health of Kansans is of the highest importance for Kansas units of government. As recognized by the Kansas Supreme Court:

> "Among all the objects sought to be secured by government, none is more important than the preservation of the public health; and, an imperative obligation rests upon the state through its proper instrumentalities or agencies to take all necessary steps to accomplish this objective.
>
> Statutes enacted for this purpose should be liberally construed and the most extensive power may be conferred on administrative boards, either state or local, to carry out such purpose."[2]

This importance is reflected in Kansas public health laws, which provide broad authority to the Governor, LHOs and the county boards of health.

The Governor. The Governor has statutory authority to issue executive orders during the period of a state of emergency declared under K.S.A. 48-924. Subsequent to declaring the State of Disaster Emergency on March 12, 2020, Governor Kelly has issued a number of EOs related to the COVID-19 Pandemic. To mitigate the spread of COVID-19, on March 28, 2020, pursuant to K.S.A. 48-924 and 48-925, Governor Kelly issued EO 20-16[3] establishing a statewide "stay home" order in conjunction with the Kansas Essential Functions Framework ("KEFF") for COVID-19 response efforts.

According to Governor Kelly's EO 20-15,[4] KEFF is "a framework for identifying and continuing essential functions that must remain operational during a local "stay home" or similar order to maintain critical services and infrastructure during the COVID-19 pandemic." EO 20-16 remained in place statewide through May 3, 2020. On April 30, 2020, Governor Kelly issued EO 20-29,[5] which implemented the first phase of "Ad Astra: A Plan to Reopen Kansas." EO 20-29 set forth the Governor's plan to re-open businesses and activities in phases. Phase One of the Governor's reopening plan allowed local governments to implement "more restrictive orders or provisions regarding businesses, mass gatherings, or stay-home requirements" so long as performance of essential functions under KEFF was allowed. Eventually, however, Governor Kelly abandoned her reopening plan and devolved the reopening effort to local units of government, mostly through orders issued by LHOs.[6]

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[2] *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 665 (1957) (citations omitted).
[3] *Available at* https://governor.kansas.gov/wp-content/uploads/2020/03/EO20-16.pdf (last accessed Sept. 21, 2020).
[4] *Available at* https://governor.kansas.gov/wp-content/uploads/2020/03/EO-20-15-Executed.pdf (last accessed Sept. 21, 2020).
[5] *Available at* https://governor.kansas.gov/wp-content/uploads/2020/04/EO-20-29-Implementing-Phase-One-of-Ad-Astra-Plan.pdf (last accessed Sept. 21, 2020).
[6] *KS Governor Laura Kelly puts Reopening Plan in Counties' Hands*, KSHB Kansas City (May 26, 2020) *available at* https://www.kshb.com/news/coronavirus/ks-gov-laura-kelly-puts-reopening-plan-in-counties-hands (last accessed Sept. 18, 2020).

The Local Health Officer. The LHO is a person " licensed to practice medicine and surgery" appointed by the County Board of Health to oversee county health.[7] The LHO serves in an advisory capacity to the County Board of Health and as the LHO with its own unique powers.[8] The LHO's statutory authority is exceedingly broad. K.S.A. 65-202 provides that the local health officer "shall use **all known measures** to prevent the spread of any such infectious, contagious or communicable disease . . . ." (Emphasis added.) Under K.S.A. 65-129b(a)(1)(A), the LHO "may issue an order requiring an individual who the local health officer or the secretary has reason to believe has been exposed to an infectious or contagious disease to seek appropriate and necessary evaluation and treatment . . . ." Further, the LHO may order individuals or groups of individuals to quarantine or isolate to prevent or reduce the spread of disease.[9]

The County Board of Health. The Board of County Commissioners acts as the County Board of Health for its respective county.[10] The County Board of Health appoints a LHO, who also serves in an advisory capacity to the board. Section 37 of H.B. 2016 made a change to K.S.A. 65-201 allowing the Board of County Commissioners[11] to "review, amend, or revoke" an order issued by the LHO.[12]

K.S.A. 65-119. Both the local health officer and the County Board of Public Health are authorized to issue public orders under K.S.A. 65-119:

> "Any county or joint board of health or local health officer having knowledge of any infectious or contagious disease, or of a death from such disease, within their jurisdiction, shall immediately exercise and maintain a supervision over such case or cases during their continuance, seeing that all such cases are properly cared for and that the provisions of this act as to isolation, restriction of communication, quarantine and disinfection are duly enforced."[13]

All of these public health statutes are to be broadly interpreted:

> "Among all the objects sought to be secured by government, none is more important than the preservation of the public health. *State, ex rel., v. Fadely*, 180 Kan. at 665, 308 P.2d 537. It is fundamental that where a statute is designed to protect the public, the language of that statute must be construed in the light of the legislative intent and purpose and is entitled to a broad interpretation so that its public purpose may be fully carried out."[14]

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[7] K.S.A. 65-201.
[8] *Id.*
[9] K.S.A. 65-129b(a)(1)(B).
[10] K.S.A. 65-201.
[11] Notably, this power is to the County Commissioners, not sitting as the County Board of Health.
[12] *Available at* http://www kslegislature.org/li_2020s/b2020s/measures/documents/hb2016_enrolled.pdf.
[13] K.S.A. 65-119.
[14] *State v. Mountjoy*, 257 Kan. 163, 177 (1995).

Section 37 of H.B. 2016 also rebalanced the power between the LHO and the County Commissioners/County Board of Health by allowing the county commissioners to "review, amend, or revoke" an order issued by the LHO, including an order limiting or restricting public gatherings under K.S.A. 65-119.[15]

A Patchwork of Local Health Orders

During the COVID-19 Pandemic, the major hallmark of local orders issued by individual county LHOs has been inconsistency. Early on in this crisis, counties did not effectively understand the statutory structure under which local "stay home" orders were issued. Counties issued these orders pursuant to K.S.A. 65-202, 65-119, and 65-129b; however, the early "stay home" orders failed to notify citizens as to their right to a hearing within 72 hours under K.S.A. 65-129c and the fact that employers could not terminate employees pursuant to K.S.A. 65-129d.[16] More importantly, counties were applying inconsistent assessments of what constituted "essential," sometimes without adhering to the Cybersecurity and Infrastructure Security Agency ("CISA") guidelines.[17]

Currently, these issues continue to persist under the present-day framework. Counties continue to misunderstand the statutory structure under which Chapter 65 orders are issued. For example, counties have issued curfew orders,[18] employee screening requirements,[19] mask orders,[20] warrantless search regimes,[21] and sports restrictions.[22] There is not specific statutory authority for these orders. Rather, they are issued under the broad reservoir language in K.S.A. 65-202 that states "all known measures" may be used to control an outbreak. However, many of these orders incorrectly cite to enforcement under K.S.A. 65-129b even though the orders are not "quarantine" or "isolation" orders. Additionally, the orders at times cite enforcement authority under K.S.A. 65-127, however, this statute does not reference a violation of K.S.A. 65-202 as actionable conduct. Furthermore, if a jurisdiction invokes authority under K.S.A. 65-129b, it also must follow the due process provisions in K.S.A. 65-129c. Jurisdictions have failed and continue to fail to notify their citizens of the rights available to them under K.S.A. 65-129c.

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[15] *Available at* http://www kslegislature.org/li_2020s/b2020s/measures/documents/hb2016_enrolled.pdf.
[16] *See eg.* https://www.franklincoks.org/DocumentCenter/View/12274 (last accessed Sep. 17, 2020).
[17] *See* https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19 (last accessed Sep. 17, 2020).
[18] *See eg.* https://www.rileycountyks.gov/ArchiveCenter/ViewFile/Item/2752 (last accessed Sept. 17, 2020).
[19] *See eg.* https://www.rileycountyks.gov/ArchiveCenter/ViewFile/Item/2745 (last accessed Sept. 17, 2020).
[20] *See eg.* https://www.wycokck.org/WycoKCK/media/Health-Department/Documents/Communicable%20Disease/COVID19/06272020LocalHealthOfficerOrderRegardingMasks.pdf (last accessed Sep. 17, 2020).
[21] *See eg.* https://linncountynews net/news/special-order-of-the-linn-county-public-health-officer-may-1-2020-600-pm (last accessed Sep. 17, 2020) *see also* https://www.facebook.com/linncountyhealthdepartment/posts/2663738533905520 (last accessed Sept. 18, 2020).
[22] *See eg.* https://alpha.wycokck.org/files/assets/public/health/documents/covid/08132020localhealthofficerorderregadingsports.pdf (last accessed Sept. 17, 2020).

Additionally, many counties make their orders incredibly difficult to find. The Kansas Chamber maintained a list of local orders in effect[23] but other than that project, KDHE nor any other government agency maintained a consolidated list of local orders in effect. Given the patchwork of restrictions, individual citizens cannot be expected to be able to understand which restrictions are in place in various geographic areas given the constant change and overlapping applications of applicable orders.

Kansas Essential Functions Framework

As you all know, in late March of 2020 the Kansas Governor took the unprecedented step of issuing EOs 20-15 and EO 20-16 creating the KEFF. These EOs commanded Kansans to stay in their homes unless they were performing an "essential activity," which included working to execute an "essential function" under the KEFF. An open records investigation[24] into the KEFF found the KEFF "unnecessarily shut down businesses, even ones that proposed plans to continue safely operating under the guidelines." A review of essential business approvals and denials provided by the Kansas Department of Emergency Management ("KDEM") showed a level of arbitrary and, at times, irrational decision making by a small, insular group of roughly five unelected individuals. Small businesses in various industries including photography, dog grooming, furniture stores, tabletop games, vinyl records, online sales, and personal training requested "essential" designations. Many of these businesses showed a willingness to protect customers and employees by adhering to reasonable safeguards. But because none of their industries were chosen as "essential," their requests were denied.

Allowed to Operate While Following Guidance	Not Allowed to Operate even if Following Guidance
Golf courses and online golf retailers	Non-food retail companies taking orders for products online and shipping to customers
Liquor stores	Non-food retail companies selling products to be picked up without customer contact
Vape and smoke shops	Photographers
Home renovations and pool cleaning	Dog groomers
Farmers markets	Personal trainers
Flower shops	Gyms
Candy shops	
Scrap gold and silver buyers	
Bait shops	

The first column in the table above shows examples of which businesses were allowed to continue operating in some capacity, while the second column shows examples of businesses that were closed, regardless of their ability to follow the safety guidance. One

[23] *See* https://www kansaschamber.org/countyorders/ (last updated July 3, 2020) (last accessed Sept. 21, 2020).
[24] *See* https://mk0xituxemauaaa56cm7 kinstacdn.com/wpcontent/uploads/2020/07/2020_AFPF_ShutDownReport.pdf (last accessed Sept. 18, 2020).

common theme was business owners offering details on how they would keep customers and employees safe by fundamentally changing their business operations. For example, one business owner wrote in the following to the "KEFF Team":

> We are a business of 100 employees that ships vinyl records and vinyl record cleaning fluids (manufactured in-house) directly to residences. We have sent all of our staff to work from home with the current exception of two warehouse workers in a 30,000-square-foot warehouse to continue packaging and shipping orders and manufacturing the record cleaning chemicals. If we could be allowed to continue having just one person all alone in a 30,000-square-foot warehouse, we could continue operations and save the jobs of 100 people. Obviously, our business would still be considerably impacted, but allowing just one warehouse worker to work in complete isolation would allow us to continue to operate. We hope that this request and our willingness to comply will be seen as very reasonable. We are in favor of the mandate. We are in favor of measures to protect our state's citizens and our company's employees. We wish to comply. This one small measure would make a massive difference for the lives of a great many people.[25]

The above business was denied an "essential" designation even though any risk of spreading COVID-19 was minimal.

Another disconcerting aspect of the KEFF model was the inordinate power wielded by a small group of unelected individuals. Kansas Majority Leader Hawkins noted due process concerns with this process in an editorial published in multiple Kansas newspapers.[26] Based on a spreadsheet of businesses and associated designations produced by KDEM in an open records response, an individual named "Bill" was key in making these decisions.[27] Further, there was no adequate appeal process for businesses to contest their designation as any appeal appears to have gone back to Bill.[28] In addition to the due process concerns described above, this model also created possible problems under the Kansas Rules and Regulations Filing Act (KRRFA)[29] as described further below.

Rather than apply an essential/non-essential framework, Kansas should have transitioned to a safe/unsafe model as proposed by the Kansas Chamber.[30] A discussion regarding this perspective was broadcasted on "Up to Date" on KCUR in late August.[31] The model

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[25] *Id.*
[26] Dan Hawkins, *Kansas Owed More to its Businesses*, Topeka Capital Journal (August 11, 2020) *available at* https://www.cjonline.com/opinion/20200811/dan-hawkins-kansas-owed-more-to-its-businesses.
[27] *See* Patrick Richardson, *A Guy Named Bill Decides Which Kansas Businesses are Essential*, the Kansas Sentinel (July 29, 2020) *available at* https://sentinelksmo.org/a-guy-named-bill-decides-which-kansas-businesses-are-essential/ (last accessed Sept. 18, 2020).
[28] *Id.*
[29] K.S.A. 77-415 *et seq.*
[30] *Available at* https://www.kansaschamber.org/wp-content/uploads/2020/04/Kansas-Chamber-Relief-Recovery-Agenda-Final-1.pdf (last accessed Sept. 18, 2020).
[31] Steve Kraske, *A New Way to Think about Essential-Nonessential Business Classifications in Kansas*, KCUR (August 25, 2020) *available at* https://www.kcur.org/podcast/up-to-date/2020-08-25/a-new-way-to-think-about-essential-nonessential-business-classifications-in-kansas (last accessed Sept. 18, 2020).

proposed by the Kansas Chamber would allow all businesses to operate so long as they put safety protocols in place to allow such businesses to operate safely. The KEFF model was ill-suited for the COVID-19 Pandemic and caused economic harm in the process. In addition to due process concerns, it should also be noted that there are equal protection concerns with regard to KEFF in that government picked "winners and losers." Recently, a federal judge in the Western District of Pennsylvania struck down as unconstitutional a similar paradigm of "life-sustaining" v. "non-life-sustaining" businesses under due process and equal protection grounds.[32] While Governor Kelly's reasoning is unknown for abandoning her re-opening plan as described above, there were an increasing number of situations that presented completely irrational results when applying the Governor's re-opening EOs. However, the Governor abandoned her plans before any of these situations could be litigated.

First Baptist Church v. Kelly[33]

Five days before Easter Sunday, on April 7, 2020, Governor Kelly issued EO 20-18[34] restricting mass gatherings of 10 or more people in a confined space, excluding clergy and assistants conducting the service. In issuing EO 20-18, the Governor cited concerns with three "clusters" of COVID-19 associated with churches out of the eleven total clusters identified at the time.[35] Later, it was revealed that the majority of "clusters" were related to long-term care facilities but a similar number of clusters were related to "private businesses."[36] However, EO 20-18 primarily targeted churches while largely exempting gatherings in secular businesses.

The next day, on April 8, 2020, the Kansas Attorney General issued a five-page memorandum to Kansas prosecutors and law enforcement advising them not to enforce the ban on religious gatherings because it "likely violate[s] both state statute and the Kansas Constitution."[37] Later that day, the Legislative Coordinating Counsel (LCC) revoked EO 20-18 pursuant to HCR 5025 citing the constitutional concerns with religious liberty raised by the Attorney General.[38] On April 10, 2020, the Governor filed a Petition

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[32] *County of Butler v. Wolf*, 2:20-CV-677 (W.D. Penn Sept. 14, 2020) *available at* https://www.courtlistener.com/recap/gov.uscourts.pawd.266888/gov.uscourts.pawd.266888.79.0_1.pdf (last accessed Sept. 18, 2020).

[33] *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. 2020).

[34] *Available at* https://governor kansas.gov/wp-content/uploads/2020/04/20-18-Executed.pdf (last accessed Sept. 21, 2020).

[35] Jonathan Shorman, "Kansas Has 3 Church C-Related COVID-19 Clusters, state says amid scramble for Supplies," Wichita Eagle (April 6, 2020), *available at* https://www.kansas.com/news/coronavirus/article241810656.html (last accessed September 18, 2020).

[36] Michael Stavola, "Fifth Coronavirus Cluster Located in Sedgwick County," Wichita Eagle (April 14, 2020), *available at* https://www kansas.com/news/coronavirus/article241999411 html (last accessed September 18, 2020).

[37] *Available at* https://ag.ks.gov/docs/default-source/documents/addendum-1-to-law-enforcement-duties-and-authorities-memo.pdf?sfvrsn=7a60ac1a_2 (last accessed Sept. 21, 2020).

[38] A press release from Kansas House leadership is quoted by KWCH News. "Lawmakers Overturn Religious Worship Size Limits in KS, Rule Sticks in Sedgwick County," KWCH News (April 8, 2020), *available at* https://www.kwch. com/content/news/Kansas-AG-says-religious-restrictions-not-enforceable-569479791.html (last accessed September 18, 2020).

in *Quo Warranto* with the Kansas Supreme Court citing concerns that widespread religious gathering would erupt across the State on Easter if the Court did not rule immediately to clarify the confusion.[39] The next day, after oral argument, the Kansas Supreme Court struck down the LCC's action, focusing on the text of HCR 5025 without making any ruling on the constitutional and religious liberties questions raised. The decision in this matter was issued by the Kansas Supreme Court late the day before Easter. This left the ban on religious gatherings intact.

Leading up to Easter Sunday, two rural Kansas churches attempted to prepare their services based on the legal uncertainty involving religious mass gatherings. On Easter Sunday, April 12, First Baptist Church, Dodge City, KS and Pastor Stephen Ormord attempted to hold an outdoor "drive-in" church service with approximately 20 of their congregants parked in cars in front of the church. Due to high winds and technological difficulties, the congregants were unable to hear or participate in the service. Given this experience, First Baptist Church had concerns with the availability of internet streaming and the logistics involved in "drive-in" services. Additionally, concerns were raised about church members having low bandwidth or no internet access.

On Easter Sunday, April 12, 2020, in Junction City, Kansas, Calvary Baptist Church and Pastor Aaron Harris held an indoor church service with approximately 21 of their congregants while adopting rigorous social distancing and health safety protocol to protect individuals gathered for worship. A member of local law enforcement briefly monitored the service inside the building. In the days following, Pastor Harris was contacted by the Geary County Sheriff and informed that he would be subject to criminal enforcement of Governor's EO 20-18 should his church hold an in-person service with more than 10 congregants in the pews in following weeks. Furthermore, Kansas law enforcement officials, including the Geary County Sheriff, publicly stated they intend to enforce EO 20-18.[40]

On April 15, 2020, in an effort to avoid conflict and in the spirit of cooperation, First Baptist Church sent a letter through counsel to Clay Britton, the Governor's Chief Counsel. In the letter, First Baptist Church implored the Governor to narrowly tailor EO 20-18 and proposed various safety protocols. The Governor's Office provided an inconclusive response and the churches filed suit. A federal judge issued a temporary restraining order against Governor Kelly noting the following:

> Given the circumstances, Plaintiffs have made a substantial showing that development of the current restriction on religious activities shows religious activities were specifically targeted for more onerous restrictions than comparable secular activities. The Governor previously designated the attendance of religious services as an "essential function" that was exempt from the general prohibition on mass gatherings. That designation has not been rescinded or modified, yet

[39] *See* Pl.'s Mot. to Expedite, *Kelly v. Legislative Coordinating Counsel*, No. 122,765 (Kan. 2020).
[40] Nicole Asbury, "Kansas Police say they will Enforce Gov. Kelly's Order Limiting Religious Gatherings," Kansas City Star (April 16, 2020), https://www kansascity.com/news/politics-government/article241999171.html (last accessed September 18, 2020).

> in EO 20-18 and EO 20-25 churches and religious activities appear to have been singled out among essential functions for stricter treatment.[41]

Ultimately, an agreement was reached when the Governor abandoned her discriminatory orders targeting churches and the lawsuit was dismissed.

The Body Lab, LLC v. LeMaster[42]

On March 22, 2020, the Johnson County LHO issued an Emergency Order of Local Health Officer that directed individuals to stay home unless participating certain allowed activities and directed various businesses to cease operations (the "1st JOCO Stay Home Order").[43] The 1st JOCO Stay Home Order was issued under K.S.A. 65-129b which allowed the LHO to issue an order against individuals who have been exposed or pose a "substantial risk of transmitting the disease or condition to the public." The 1st JOCO Stay Home Order was issued county-wide and affected all individuals in Johnson County regardless of exposure or risk of exposure. The 1st JOCO Stay Home Order did not notify individuals of their right to a hearing and did not notify businesses that terminating individuals subject to a quarantine or isolation order constitutes a crime under K.S.A. 65-129d.

Over the next few weeks, the Governor issued a number of EOs limiting Mass Gatherings and limiting personal and business freedoms. In particular, the Governor issued EOs 20-15 and 20-16 which established the KEFF, as described above, categorizing "essential functions" and designated businesses "essential" or "non-essential." EO 20-16 did not require prior approval to be designated "essential" or "non-essential" and terminated at 12:00 a.m. on May 4, 2020. Although prior approval was not required by EO 20-16, on April 27, 2020 The Body Lab, LLC ("The Body Lab"), emailed the Kansas Department of Health and Human Services ("KDHE") for a determination of its essential function and received a form email response with no clarification.

On April 30, 2020, the Johnson County LHO issued an Emergency Order of Local Health Officer (the "2nd JOCO Stay Home Order")[44] extending the imposition of EO 20-16 through 11:59 p.m. on May 10, 2020. This Order was also issued under K.S.A. 65-129b and was issued county-wide and affected all individuals in the County regardless of exposure or risk of exposure. Unlike the 1st JOCO Stay Home Order, Paragraph 3 of the 2nd JOCO Stay Home Order rightfully acknowledged that individuals had a right to a hearing under K.S.A. 65-129c. However, the 2nd JOCO Stay Home Order did not notify businesses that terminating individuals subject to a quarantine or isolation order constituted a crime under K.S.A. 65-129d.

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[41] *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021 at *7 (D. Kan. Apr. 18, 2020).
[42] *The Body Lab, LLC. V. LeMaster*, 20CV01957 (Johnson Co. D. Ct. 2020).
[43] *Available at* https://www.jocogov.org/sites/default/files/documents/CMO/JoCo%20Public%20Health%20Officer%20Stay%20at%20Home%20Order%203-22-20.pdf (last accessed Sept. 18, 2020).
[44] *Available at* https://www.jocogov.org/sites/default/files/documents/CMO/04-30-2020%20Emerg%20Order%20Local%20Health%20Officer.pdf (last accessed Sept. 18, 2020).

In the evening of April 30, 2020, the Kansas Governor issued Executive Order EO 20-29 which was a plan to re-open the State and Kansas and removed many of the restrictions imposed by EO 20-16. However, on Friday, April 1, 2020, in meeting of the County Commission the Johnson County LHO refused to rescind the 2nd JOCO Stay Home Order basing his opinion on actions of other jurisdictions and not on metrics from within Johnson County. That being said, EO 20-29 allowed businesses, including "gyms and fitness centers" to "repurpose" to serve "essential functions" as outlined in EO 20-16 and KEFF.

The Body Lab argued that it should not be categorized a "gym or fitness center" because it altered its business model to repurpose and more directly serve essential functions under EO 20-16. To achieve this, The Body Lab provided extensive pre and post professional rehabilitation and therapeutic health services and many of The Body Lab's clients were referred by doctors. Additionally, the health studio employed multiple certified medical professionals and supported community health and mental health services. Some of The Body Lab's clients were in the midst of rehabilitation and were in danger of experiencing rapid muscle atrophy without continuing to make progress. The Body Lab also provided wellness and physical health training to essential workers who needed physical therapeutic training for joint replacement procedures postponed due to the pandemic. The Body Lab also sold health beverages and repurposed to sell health supplements. Based on these actions, The Body Lab argued that it met various essential functions, including KEFF 300.4: "Educate and Train Essential Functions Personnel," KEFF 300.20: "Provide Medical Care and Services," KEFF 300.25: "Support Community Health and Mental Health Services." KEFF 400.6: "Produce and Provide Human and Animal Food Products and Services." The Body Lab also put in place numerous safety protocols.

Given the essential functions fulfilled by The Body Lab, a planned re-opening was scheduled for May 6, 2020 and an email sent out to this effect. On May 4, 2020, the Leawood Police Department contacted The Body Lab and threatened enforcement and Counsel for The Body Lab responded. On May 6, 2020, Counsel for The Body Lab reached out to the Johnson County Counselor's Office and received an inconclusive determination. With the threat of criminal prosecution and without clear guidance from government authorities, The Body Lab postponed its re-opening even though it met the text of the relevant EOs, as written.

On May 6, 2020, The Body Lab and its owner filed suit in Johnson County District Court seeking a 72-hour isolation hearing under K.S.A. 65-129c. A hearing was granted. At the hearing, The Body Lab argued that the Johnson County LHO did not have authority to interpret the Governor's EOs with the force of law without complying with the KRRFA.[45] This argument seemed to resonate with the Judge who stated, "[e]ven in an emergency format there has to be some way for people to get the attention of the authorities through some recognized channel. And having a law enforcement officer show up and say "Hey, KEFF says this and you're not -- and my opinion is you" -- you know, you're threatened with criminal prosecution if you don't comply. That's not good

[45] K.S.A. 77-415 *et seq.*

enough."[46] He went on note that it was incumbent to provide additional due process the longer the pandemic persisted by saying, "I understand it may have served a purpose for the very immediate future, but I think down the road as we dig in on this thing, and I suspect as this whole pandemic is not going to be cleared up by January, we're going to have folks like Mr. Green here who are wondering 'Hey, I've done everything I can to make my business safe. And why is it I can't operate but a Home Depot can?'"[47] Ultimately, a written opinion was not issued in this case and the Judge directed the parties to work together to determine if The Body Lab's safety protocols were adequate. The Body Lab quickly re-opened and Johnson County did not attempt further enforcement.

The City of Emporia v. Flowers[48]

Similar to The Body Lab Case above, local officials in Emporia also issued interpretative guidance arguably in violation of KRRFA. On May 27, 2020 the Lyon County Board of County Commissioners issued a disaster declaration incorporating Governor Kelly's "Modified Phase 2 of the Ad Astra: A Plan to Re-open Kansas."[49] The very same day as issuing the disaster declaration, the City of Emporia issued the owner of "The Gym," a restaurant in Emporia, Kansas a citation for operating his business allegedly in violation of "Modified Phase 2 of the Ad Astra: A Plan to Re-open Kansas." The citation was issued based upon nothing more than a local health department employee's opinion that the Gym was not a "bar and grill." While doing so, the accusing officer relied on the opinion of an employee of a local health department to determine the business's classification under the just-issued declaration.

Counsel for the Defendant, Mr. Flowers, filed a Motion to Dismiss arguing, among other things, that Ordinance 20-08 presented numerous violations of Mr. Flower's Right to Due Process under the Fourteenth Amendment of the United States Constitution as well as Section 18 of the Kansas Bill of Rights in the Kansas Constitution stating it was unconstitutionally vague and local interpretations adding clarity violate due process as well as KRRFA.

The Officer's narrative in the Flowers Case stated that an employee of the Flint Hills Community Health Center (hereinafter "FHCHC"), Environment Health with no title or authority listed, unilaterally decided that Defendant's business "did not meet the criteria to be considered a bar and grill." Nowhere is "bar and grill" referenced as a relevant legal term in EO 20-34.[50] Rather, the important legal terms are "restaurant" versus "bar." If the business was deemed a "restaurant," it could legally operate under EO 20-34. If the business was considered a "bar," than the analysis should have shifted to whether or not the "bar" had been repurposed to meet an "essential function" under KEFF, as described

[46] *See* Hearing Transcript, *The Body Lab, LLC. V. LeMaster*, 20CV01957 at 44 (Johnson Co. D. Ct. 2020).
[47] *Id.*
[48] *City of Emporia v. Flowers*, Case No. 20-01615 (Emporia Mun. Ct. 2020).
[49] Although it was incorporated directly, it appears Lyon County may have been attempting to incorporate EO 20-34 *available at* https://governor kansas.gov/wp-content/uploads/2020/05/EO-20-34-Implementing-Phase-2-Executed.pdf (last accessed September 18, 2020).
[50] *Available at* https://governor kansas.gov/wp-content/uploads/2020/05/EO-20-34-Implementing-Phase-2-Executed.pdf (last accessed Sept. 21, 2020).

in The Body Lab Case above. However, none of these things happened and the City took the uninformed and arbitrary opinion of an employee of the FHCHC as authoritative.

Additionally, EO 20-34 provided no definition of what constituted a "restaurant" and what constitutes a "bar." Some definitions were highlighted from state statute and the City of Emporia Municipal Code by Mr. Flowers' counsel but none of those definitions were definitive, allowing broad disparity in possible interpretations. Without relevant definitions, EO 20-34 allowed reasonable individuals to come to different conclusions as to what was actually meant by the terms at issue. Further, this lack of clarity gave individuals no adequate warning of the relevant proscribed conduct.

The Emporia Ordinance also provided no guard against arbitrary and unreasonable enforcement as exemplified by the FHCHC employee's arbitrary determination that the Defendant's business did not qualify as a "bar and grill." Arguably, this enforcement was *per se* unreasonable because it relied on the predicate that the Defendant's business did not qualify under a definition that exists nowhere in Emporia Ordinance, the Disaster Declaration, the Ad Astra Plan, or EO 20-34. In fact, the designation of a "bar and grill" included the term "bar" which would mean that that the business could ***not*** operate under EO 20-34 unless it was repurposed. This is completely contrary to what the FHCHC employee was asserting in the first place - that if the Defendant's business was a "bar and grill" it could operate.

In the Flowers Case, the FHCHC and/or the Local Health Officer were working under a definition of "restaurant" or "bar and grill" as described above that was unwritten and unknowable by members of the public, including the Defendant. To the extent such a secret definition existed and was applied to the Defendant to determine his business was in violation of a city ordinance, Mr. Flowers argued the application of this definition violated the his Right to Procedural Due Process because it used the force of law to cause him to shut down his business and deprive him from the operation of his property or face criminal sanctions without the due protections of the legislative process. Mr. Flowers argued that this was an unconstitutional delegation of the legislative function as well as a violation of due process because the two are closely linked through caselaw.[51]

While the legislature delegated some of its legislative powers to the Governor under KEMA to author EOs in an emergency under K.S.A. 48-924 and 48-925, such delegation cannot be extended to local agencies without a statutory mechanism in addition to some level of procedural due process similar to the KRRFA.[52] By applying their own definitions to the Ad Astra Plan or Governor's Executive Order, Mr. Flowers argued that the FHCHC unlawfully exercised the legislative function and, in doing so, essentially created a new crime as well as depriving the Defendant of his property by ordering him to shut down his business.

In *Taylor v. Kansas Dept. of Health and Environment*, the Kansas Court of Appeals outlined the baseline of procedural due process under federal law noting "'at a

[51] *See Gumbhir v. Kansas State Bd. of Pharmacy*, 228 Kan. 579, 581–82 (1980).
[52] K.S.A. 77-415 *et seq.*

minimum' requires that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[53] By using an unknown definition of "restaurant" that equated to a "bar and grill," and because such definition was contained only in mind of the FHCHC's employee, she and the FHCHC arguably violated the Defendant's Right to Due Process by essentially creating law out of thin air without any procedural due process. The *Taylor* Court went on to state:

> The essence of constitutionally protected procedural due process is notification to an individual of the basis for pending government action impairing or extinguishing his or her protected property right or liberty interest and a meaningful opportunity to explain why that action would be improper or erroneous. That is a fundamental right or protection against government overreaching and aims to prevent a wrongful deprivation.[54]

Accordingly, both the legislative process and KRRFA afford the public procedural due process through notice, comment, hearing, and written promulgation of rules and regulations. While KEMA grants the Governor limited legislative power to issue EOs in an emergency which are granted the force of law, it does not give local health employees the ability to essentially promulgate regulations or apply their own interpretations to an EO, which is what happened in the Flowers Case.

The general citizenry of Kansas must have an opportunity to be heard on the effect of bureaucratic interpretations of the Governor's EOs, however, under the current statutory framework this is impossible since local authorities have not been granted the authority to promulgate rules and regulations. K.S.A. 77-415(b) states in relevant part:

> Unless otherwise provided by statute or constitutional provision, each rule and regulation issued or adopted by a state agency shall comply with the requirements of the rules and regulations filing act. Except as provided in this section, *any standard, requirement or other policy of general application may be given binding legal effect only if it has complied with the requirements of the rules and regulations filing act.*[55]

Accordingly, Mr. Flowers argued the FHCHC's interpretation of "restaurant" or application of the "bar and grill" category had no binding legal effect and was legally irrelevant. While the FHCHC could provide general guidance as to their view of the Governor's EOs, such general guidance could not give rise to any legal right or duty under K.S.A 77-415(b)(2)(D). However, that is not what the FHCHC did in the Flowers Case, it used an arbitrary and unfounded interpretation to impose a legal duty on a Kansas citizen to shut down his business, arguably contrary to Kansas law.

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[53] *Taylor v. Kansas Dept. of Health and Environment*, 49 Kan.App.2d 233, 240-241 (2013).
[54] *Id.* at 242-243 (citations omitted).
[55] K.S.A. 77-415 (emphasis added).

To the extent that the City cited EO 20-34.7.b as granting authority to the FHCHC to interpret whether or not the Defendant's business was meeting an "essential function" under KEFF, the FHCHC would then arguably qualify under the definition of "State Agency" under K.S.A. 77-415(c)(7), which states:

> "State agency" means any *officer*, department, bureau, division, board, authority, *agency*, commission or institution of this state, except the judicial and legislative branches, which is authorized by law to promulgate rules and regulations concerning the administration, enforcement *or interpretation of any law of this state*.[56]

If EO 20-34.7.b. granted this authority, the first sentence of K.S.A. 77- 415(b) would apply and any such an interpretation or determination would then qualify under the definition of "rule and regulation" under KRRFA in K.S.A. 77-415(c)(4). Accordingly, to issue interpretations and assessments with the force of law, the FHCHC would have to fulfill all of the procedural due process requirements of the KRRFA, including but not limited to, public notice, opportunity for public comment, an opportunity for a public hearing, and written promulgation.

Further, KEMA does not provide rulemaking authority to local units of government to interpret an EO. Instead, a local unit of government must issue its own ordinances if it intends to provide interpretations to an EO carrying the force of law. Alternatively, the Adjutant General is granted some rulemaking authority under K.S.A. 48-926 but did not attempt to provide any interpretations of the Governor's EOs during the COVID-19 Pandemic. Of course, as it relates to the Flowers Case, none of these procedural steps occurred with FHCHC's arbitrary and unfounded interpretation. Accordingly, the interpretation had no force of law and was likely issued in violation of KRRFA. After counsel for Mr. Flowers presented these arguments, the City of Emporia dismissed the case.[57]

Taylor v. Allen[58]

In May 2020, two Kansas citizens sued Linn County in federal court based on Linn County's establishment of what the plaintiffs argued was a "warrantless search regime." The regime was imposed by a May 1, 2020 Emergency Public Order by the Linn County LHO (the "Linn County Order") that required businesses and professionals to compile, and disclose upon demand for any reason, in perpetuity, a list of their patrons, patients, and clients. The Linn County Order required businesses and professionals to compile, and disclose upon demand for any reason, a list of their patrons, patients, and clients. The Linn County Order applied to physicians, lawyers, banks, dentists, restaurants, and others. The plaintiffs argued that the Linn County Order intruded upon doctor-patient and

[56] K.S.A. 77-415(c)(7) (emphasis added).
[57] Adam Blake, *Gym Sports Bar Sees Public Health Order Violation Case Dropped*, the Emporia Gazette (Aug. 18, 2020) *available at* http://www.emporiagazette.com/free/article_8473b40e-e177-11ea-80b9-ef734a591f4f.html (last accessed Sept. 21, 2020).
[58] *Taylor v. Allen*, 2:20-CV-02238 – HLT-ADM (D. Kan. 2020).

attorney-client relationships and is so broad it would easily reveal a person's movements over time.

The plaintiffs in this case argued that Linn County Order's warrantless search regime was unconstitutional because it authorized warrantless searches and seizures for any purpose, in perpetuity, without any precompliance review, and deprived the plaintiffs and others similarly situated of their Fourth Amendment rights. Linn County imposed this search regime even though there were no active COVID-19 cases in Linn County, Kansas at the time.[59] At the time suit was filed, only five confirmed COVID-19 cases[60] existed in Linn County, Kansas out of the roughly 9,700 residents,[61] and the last COVID-19 diagnosis was March 28, 2020.[62]

When asked about this case, Governor Kelly "said city or county orders requiring businesses to keep records of consumer visits was unreasonable and an alternative voluntary approach with individuals keeping a journal of their public activity might be sufficient to assist health officials with contact tracing of COVID-19. … 'I think that's going a little bit too far."[63] Additionally, KDHE Secretary Lee Noman "said the agency hadn't recommended municipal governments compel businesses to compile information of customers."[64]

After a hearing in the case was held, Linn County updated the Linn County Order to rely on voluntary compliance and required a warrant or other judicial process if information was not turned over to the Linn County Health Department.[65] In part, the actions of Linn County and this lawsuit prompted the Kansas Attorney General to seek privacy protections in contact tracing. These recommendations were included in Section 16 of HB 2016 during the 2020 Special Session.[66]

En Masse Quarantine/Isolation Orders

On September 3 and 4, 2020 the Atchison County Commission and its LHO attempted to impose a two-week quarantine/isolation order on approximately 2,000 Kansas citizens

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[59] *Available at* https://www.facebook.com/LinnCoEmergencyManagement/posts/1523426987816866 (last accessed Sept. 18, 2020).
[60] *Id.*
[61] *Available at* https://www.census.gov/quickfacts/fact/table/linncountykansas,US/PST045219 (last accessed Sept. 18, 2020).
[62] Plaintiffs' Memorandum in Support of Temporary Restraining Order, *Taylor v. Allen*, 2:20-CV-02238 – HLT-ADM, 1 (D. Kan. 2020).
[63] Tim Carpenter, *Kansas coronavirus update: Gov: Laura Kelly not a fan of city, county orders forcing businesses to log customer visits*, The Topeka Capital-Journal (May 11, 2020) *available at* https://www.hutchnews.com/news/20200511/kansas-coronavirus-update-gov-laura-kelly-not-fan-of-city-county-orders-forcing-businesses-to-log-customer-visits (last accessed Sept. 18, 2020).
[64] *Id.*
[65] Sarah Motter, *Linn County Revises Health Order after Facing Lawsuit*, WIBW (May 18, 2020) *available at* https://www.wibw.com/content/news/Linn-County-revises-Health-Order-after-facing-lawsuit-570570861.html (last accessed Sept. 18, 2020).
[66] *Available at* http://www kslegislature.org/li_2020s/b2020s/measures/documents/hb2016_enrolled.pdf (last accessed Sept. 18, 2020).

and students at Benedictine University.[67] Mike Kuckelman, the Chairman of the Kansas Republican Party called it "unprecedented" and "one of the most draconian two-week house arrest orders … we've seen in the US."[68] He went on to say, "[t]he County Commissioners and their health officer were willing to simply ignore the Constitution."[69]

A group of attorneys volunteered to travel to Atchison County to file Petitions for 72-hour hearings under K.S.A. 65-129c on behalf of students who wished to avoid the quarantine/isolation order.[70] In the face of numerous students contesting the order and Benedictine University's willingness to impose additional safeguards, a severe strain on the court system in Atchison County was narrowly avoided.[71] However, key in this situation was the availability the due process afforded by a statutorily required 72-hour hearing.

Additionally, on September 17, 2020, the Principal of Timber Creek Elementary School sent an email to parents purporting to order approximately 200 students into a 14-day quarantine/isolation by stating in an email "[y]our child *must* quarantine for 14 days through September 29, returning to schools on Oct. 5. Individuals in quarantine should stay home for the duration of the *14 days regardless of test results*."[72] The Kansas Justice Institute ("KJI") sent a letter raising legal concerns with the purported order.[73] Now, it appears that the school and district may be backing away from the purported order by saying it was merely a recommendation from the Johnson County LHO; however, this situation is currently evolving. Nothing in the email made it clear that it was merely a recommendation. Rather, the language used appeared mandatory.

Presumably, the school district is taking the position that the email was merely a "recommendation" to avoid allowing individuals the right to request 72-hour hearings under K.S.A. 65-129c, as raised in KJI's Letter. However, taking this position may create its own problems for the school district. Under sections 8 through 15 of H.B. 2016 (the "COVID-19 Business Liability Protection Act" or "C-19 BLPA"), "persons" include "public corporation, government or political subdivision, agency or instrumentality."[74] Accordingly, under Section 11 of the C-19 BLPA, a school district could lose its liability

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[67] James Howey, *No Resolution Thursday Concerning Proposed Benedictine Quarantine*, Atchison Globe (Sept. 4, 2020) *available at* https://www.atchisonglobenow.com/news/breaking_news/no-resolution-thursday-concerning-proposed-benedictine-quarantine/article_bf86eee8-ed94-11ea-a11f-0bf554ecc4db.html (last accessed Sept. 18, 2020).
[68] *Available at* https://www.facebook.com/mike.kuckelman (Sept. 15, 2020).
[69] *Id.*
[70] *See* https://soundcloud.com/user-53894534/9-3-mike-kuckelman-kansas-gop-chairman (last accessed Sept. 18, 2020).
[71] Mary Meyers, *BC and Atchison County Negotiate a COVID-19 Mitigation Plan*, Atchison Globe (Sept. 4, 2020) *available at* https://www.atchisonglobenow.com/news/bc-and-atchison-county-negotiate-a-covid-19-mitigation-plan/article_47a704a4-eed8-11ea-ad4a-0fd0a87bea3e.html (last accessed Sept. 18, 2020).
[72] Dave Trabert, *Kansas Justice Institute Questions Legality of Timber Creek School Quarantine*, the Kansas Sentinel (September 18, 2020) *available at* https://sentinelksmo.org/kansas-justice-institute-questions-legality-of-timber-creek-school-quarantine/ (last accessed Sept. 21, 2020).
[73] *Available at* https://sentinelksmo.org/kansas-justice-institute-questions-legality-of-timber-creek-school-quarantine/.
[74] *Available at* http://www.kslegislature.org/li_2020s/b2020s/measures/documents/hb2016_enrolled.pdf.

protections if it does not act "pursuant to and in substantial compliance with public health directives applicable to the activity giving rise to the cause of action when the cause of action accrued."[75] "Public Health Directives" include "proclamations" by a LHO under Section 9(j)(3) of H.B. 2016. Therefore, depending on how the "recommendation" was issued and how legally binding such a recommendation was, a school district could theoretically lose its protections under C-19 BLPA if it allows students and parents not to follow such a recommendation. If a "recommendation" has *any* binding legal effect, those subject to it should be entitled to a 72-hour hearing under K.S.A. 65-129c. School districts should not be allowed to "play games" by issuing purported orders simply to back away from them if the individuals under such orders begin to seek 72-hour hearings under K.S.A 65-129c. As we enter into a new school year, *en masse* orders could become more and more prevalent. It is incumbent on schools and LHOs to be clear about the "orders," "directives," "proclamations," and "recommendations" they issue because they have a real-world impact on the individuals subject to them. Accordingly, those individuals should be afforded all due process available. The legislature should make this exceedingly clear in statute.

Recommendations

1. Continue changes made by H.B. 2016, in particular:
    - Maintain County Commissioner oversight of the LHO;
    - Maintain reasonable privacy protections for contact tracing;
    - Maintain State Board of Education oversight of EOs affecting schools;[76]
    - Maintain a level of legislative oversight of orders affecting businesses;[77]
    - Maintain the clarification of the language in K.S.A. 48-925(b), making it clear that the list of powers delegated to a governor by subsection (c) is limited;
    - Require each emergency order to specify which power(s) enumerated in K.S.A. 48-925(c) provides its legal authority; and
    - Maintain the substitution of civil enforcement for criminal enforcement of violation of EOs.

2. Update language in Section 6 of H.B. 2016[78] to make it more similar to the change in K.S.A. 48-925(e),[79] which expired September 15, 2020. Suggested language to include in Section 6 could be:
    - "the governor may not issue an order that substantially burdens or inhibits the gathering or movement of individuals or operation of any religious, civic, business or commercial activity, whether for-profit or not-for-profit…"

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[75] *Id.*

[76] However, "private schools" should be removed from Section 7 of H.B. 2016 making it clear that "private schools" are regulated similarly to other not for profit businesses as noted in Recommendation 3.

[77] However, Recommendation 2 suggests language in this regard.

[78] Stating, in part, "the governor may not order the *closure or cessation of any business or commercial activity, whether for-profit or not-for-profit…*" (emphasis added).

[79] Stating, "[n]otwithstanding any provision of this section to the contrary and pursuant to the governor's state of disaster emergency proclamation issued on May 26, 2020, the governor shall not have the power or authority to *restrict businesses from operating or to restrict the movement or gathering of individuals.* The provisions of this subsection shall expire on September 15, 2020" (emphasis added).

3. Remove "private schools" from Section 7 of H.B. 2016 and treat them similarly to any other not-for-profit business.

4. Increase due process in long-term disasters by granting some level of oversight once the legislature extends a disaster declaration by adding an EO "civil rights review" by the Attorney General or the Temporary Rules and Regulations Board.

5. Clarify that KRRFA applies to EOs under KEMA by including language in K.S.A. 48-925 that states:
    - "Any interpretation purporting to carry the force of law of an Executive Order issued under this Section shall comply with the Kansas Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.*";

6. All orders issued by an LHO and certain EOs should be subject to a 72-hour hearing requirement, similar to the requirement under K.S.A. 65-119c:
    - For instance, similar to the language in Recommendation 2 above, any EO that "substantially burdens or inhibits the gathering or movement of individuals or operation of any religious, civic, business or commercial activity, whether for-profit or not-for-profit…" should be subject to a 72-hour hearing requirement for anyone affected; or
    - Alternatively, the civil rights review in Recommendation 4 could simply determine whether or not a 72-hour hearing requirement should apply, rather than entirely blocking the order from going into effect;

7. The legislature should consider language requiring KDHE to maintain a central online repository by jurisdiction of all Chapter 65 LHO Orders currently in effect;

8. Provide clarification under K.S.A. 48-933(c) as to what "commandeered or otherwise used in coping with a disaster." Arguably, this provision applies to all businesses that were shut-down under EO 20-16 as it is an "order" by the governor. The pivotal question for a Court will be whether a forced shut-down constitutes "commandeering" or "use."

Conclusion

The COVID-19 Pandemic highlighted due process and equal protection problems with the recent implementation of plans under KEMA. In particular, the issuance of broad EOs that are implemented at the local level inevitably will lead to what essentially constitutes a rule-making function without the due process afforded under the KRRFA. Because of this, the legislature should implement additional due process, particularly for long-term disasters.

House Judiciary Committee
Testimony in Support of HB 2416
Presented by Eric Stafford, Vice President of Government Affairs, Kansas Chamber
Ryan Kriegshauser, Partner, Kriegshauser Ney Law Group
Thursday, February 25, 2021

Chairman Patton and members of the committee, the Kansas Chamber appears in support of House Bill 2416. Appearing with the Kansas Chamber is Ryan Kriegshauser, private counsel to the Kansas Chamber, who has had litigatory experience over the past year giving him some subject-matter expertise on the Kansas Emergency Management Act ("KEMA"). He is here to offer recommendations on KEMA but any advocacy on this bill is on behalf of the Kansas Chamber. That being said, we appreciate the opportunity to continue offering testimony on what we've learned and experienced over the last few months in response to the COVID pandemic, many of our suggestions and the suggestions of Ryan Kriegshauser in front of the Joint Special Committee on the Kansas Emergency Management Act have been incorporated into HB 2416 which we greatly appreciate.

For the committee's convenience, we also refer the committee to the Kansas Chamber's and Ryan Kriegshauser's testimony in front of the joint committee last year which provides some increased depth which we cannot provide verbally now because of time constraints.

After reviewing HB 2416, we would offer the following suggestions to further improve this bill which has already made significant improvements to KEMA:

- We laud the inclusion of 72-hour hearing remedies in Section 1(f) using a strict scrutiny standard. However, experience dictates that businesses and individuals are hesitant to pursue this remedy in court without the help of counsel. Even in K.S.A. 65-129c where an attorney may be appointed, individuals are unable to navigate the initial process to get a matter on-file. This provision likely needs to provide some access to counsel. Perhaps, if an aggrieved party prevails on an action under this provision, attorney's fees may be awarded. Additionally, the committee should consider orders issued under K.S.A. 65-202, 65-119, and 65-101 being subject to 72-hour hearings as well under strict scrutiny.

- In Section 5(c)(1) the use of the phrase "regulatory statute" is unclear, perhaps the phrase "statute granting regulatory authority" could be used.

- We suggest a clarification that Kansas Rules and Regulations Filing Act applies to Executive Orders issued under KEMA by including language in K.S.A. 48-925 that states:
    - "Any interpretation purporting to carry the force of law of an Executive Order issued under this Section shall comply with the Kansas Rules and Regulations Filing Act, K.S.A. 77-415 *et seq.*";
    - Similar language could be included in K.S.A. 65-101 for orders issued by the Secretary of the Kansas Department of Health and Environment.

- It would help to provide clarification as to what constitutes "use" and "property" in K.S.A. 48-933. Accordingly, the following language is suggested for K.S.A. 48-933(c):

> *(1) The word "use" in this subsection (c) shall include any "taking" as it is defined in the Kansas Private Property Protections Act, K.S.A. 77-701 et seq., or any other restriction, limitation on access to or operation of private property, or exertion of control over any private property for any amount of time pursuant to an order under K.S.A. 48-920 et seq.*
>
> *(2) "Private Property" in this subsection (c) shall mean any private property as defined by the Kansas Private Property Protections Act, K.S.A. 77-701 et seq., as well as any other personal, business, or other property used by the state. This definitional shall include substantially burdening the operation of any religious, civic, business or commercial entity, whether for-profit or not-for-profit.*
>
> *(3) Any compensation under this Section shall be paid by the jurisdiction ordering the commandeering or use of the property at issue.*
>
> *(4) Unless as provided in K.S.A. 48-925a, the commandeering or government use under this section shall be limited to the actual cost of such use as determined by the board of appraisers. Under this act, compensation for the commandeering or use of any property shall not include loss of present or future profits, opportunity cost, or other extraordinary damages.*

- A new development during the pandemic is local municipalities using ordinances to create public health officers that can issue municipal orders or criminalizing state or county orders. The committee should consider how to deal with this development.

These have been difficult times. We know the Governor and local government officials are doing their best to protect the public as much as possible. We appreciate the efforts of this committee to increase the due process available under KEMA and taking the time to address this important issue.

In closing, we appreciate the opportunity to provide comments to the committee today on an important matter facing our state.

Senate Judiciary Committee
SB 273
Presented by Eric Stafford, Vice President of Government Affairs, Kansas Chamber
Ryan Kriegshauser, Partner, Kriegshauser Ney Law Group
Thursday, February 25, 2021

Madam Chair Warren and members of the committee, the Kansas Chamber appreciates the opportunity to appear in support of SB 273. Appearing with the Kansas Chamber is Ryan Kriegshauser, private counsel to the Kansas Chamber, who has had litigatory experience over the past year giving him some subject-matter expertise on the Kansas Emergency Management Act ("KEMA"). He is here to offer recommendations on KEMA but any advocacy on this bill is on behalf of the Kansas Chamber. That being said, we appreciate the opportunity to continue offering testimony on what we've learned and experienced over the last few months in response to the COVID pandemic, many of our suggestions and the suggestions of Ryan Kriegshauser in front of the Joint Special Committee on the Kansas Emergency Management Act have been incorporated into SB 273 which we greatly appreciate.

For the committee's convenience, we also refer the committee to the Kansas Chamber and Ryan Kriegshauser's testimony in front of the joint committee last year which provides some increased depth which we cannot provide verbally now because of time constraints.

After reviewing SB 273, we would offer the following suggestions to further improve this bill which has already made significant improvements to KEMA:

- In Section 1(b)(5)(b), it lists situations in which the same emergency proclamation can be extended, including when a "new or more virulent strain of the disease" may be a basis to continue the same proclamation. This has of course happened in the current pandemic is almost always likely to happen in a public health disaster. Accordingly, it may be helpful to limit this language to a "more virulent strain with a substantially higher mortality rate."

- Section 1(f)(4) references the compensation provision in K.S.A. 48-933 making it clear that "utilizing private property" implicates K.S.A. 48-933 but SB 273 does not define "use" in Section 10, other than excluding "intangible" damages. It would help to provide additional clarification as to what constitutes "use" and "property." Accordingly, the following language is suggested for K.S.A. 48-933(c):

  (1) The word "use" in this subsection (c) shall include any "taking" as it is defined in the Kansas Private Property Protections Act, K.S.A. 77-701 et seq., or any other restriction, limitation on access to or operation of private property, or exertion of control over any private property for any amount of time pursuant to an order under K.S.A. 48-920 et seq.

  (2) "Private Property" in this subsection (c) shall mean any private property as defined by the Kansas Private Property Protections Act, K.S.A. 77-701 et seq., as well as any other personal, business, or other property used by the state. This definitional shall include

substantially burdening the operation of any religious, civic, business or commercial entity, whether for-profit or not-for-profit.

(3) Any compensation under this Section shall be paid by the jurisdiction ordering the commandeering or use of the property at issue.

(4) Unless as provided in K.S.A. 48-925a, the commandeering or government use under this section shall be limited to the actual cost of such use as determined by the board of appraisers. Under this act, compensation for the commandeering or use of any property shall not include loss of present or future profits, opportunity cost, or other extraordinary damages.

The exclusion of intangible property is unclear. At a minimum, perhaps the word "speculative" might be more appropriate. Regardless, the applicability of the compensation provision should be clarified.

- In Section 3(a)(2)(A) it may be helpful to include language that the order shall be narrowly tailored to accomplish such remediation. It is suggested that this standard also be included in Section 4(d).

- We laud the inclusion of 72-hour hearing remedies in Section 4. However, experience dictates that businesses and individuals are hesitant to pursue this remedy in court without the help of counsel. Even in K.S.A. 65-129c where an attorney may be appointed, individuals are unable to navigate the initial process to get a matter on-file. This provision likely needs to provide some access to counsel. Perhaps, if an aggrieved party prevails on an action under this provision, attorney's fees may be awarded.

- The committee should consider adding K.S.A. 65-119 to Section 4(a)(2) for additional clarity.

- It is unclear whether or not Section 5 applies to "private schools" in the school district. It is our suggestion that private schools be treated similarly to businesses as ceasing their operations is an existential threat to the private school just as it is to a business.

- It is recommended that rule-making by local jurisdictions should be dealt with by this bill in a ongoing disaster. Accordingly, the following language is suggested for Section 8:

  During any state of disaster emergency declared pursuant to K.S.A. 48-924, and amendments thereto, which has been ratified by any legislative body authorized in K.S.A. 48-924, and amendments thereto, any order issued may not be clarified or interpreted by any government agency or government officer with the force of law without complying with the Kansas Rules and Regulations Filing Act, K.S.A. 77-415, as authorized in K.S.A. 48-926.

- Section 13(d)(1)(A) could include language that the order shall be narrowly tailored to accomplish such remediation similar to the proposal on Section 3(a)(2)(A).

- It is unclear whether or not Section 14 applies to "private schools" in the school district. It is our suggestion that private schools be treated similarly to businesses as ceasing their operations is an existential threat to the private school just as it is to a business.

- It is unclear whether or not Section 15 applies to "private schools" in the school district. It is our suggestion that private schools be treated similarly to businesses as ceasing their operations is an existential threat to the private school just as it is to a business.

- In Section 15, the language that county health officials "neglect" to fulfill the provisions of K.S.A. 65-126 were problematic at the beginning of the pandemic forcing the Governor to use K.S.A. 48-925 instead of the public health statutes in Chapter 65. The committee should consider whether or not the Secretary should be able to act without "neglect" at the county level in a public health disaster.

- Section 17(b)(3) could include language that the order shall be narrowly tailored to accomplish such remediation similar to the proposal on Section 3(a)(2)(A).

These have been difficult times. We know the Governor and local government officials are doing their best to protect the public as much as possible. We appreciate the efforts of this committee to increase the due process available under KEMA and taking the time to address this important issue.

In closing, we appreciate the opportunity to provide comments to the committee today on an important matter facing our state.

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

BUTLER, KRISTIN, and BOZARTH, SCOTT,

Plaintiffs/Petitioners

vs.

SHAWNEE MISSION SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant/Respondent.

Case No. 21CV2385
Chapter 60; Division 7

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.

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.

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 district*** 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.

(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.

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).

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

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*

[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.

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).

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

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

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.

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…"

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

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).

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).

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. .

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

[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.

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

[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.

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.

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

NOTICE OF ELECTRONIC SERVICE

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/s/ DWH

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

BUTLER, KRISTIN, and BOZARTH, SCOTT,

Plaintiffs/Petitioners

vs.

SHAWNEE MISSION SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant/Respondent.

Case No. 21CV2385
Chapter 60; Division 7

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.

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).

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).

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).

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).

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/

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

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.

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.

"*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

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).

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.

> " '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.

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.

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.

[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).

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.

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.

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).

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).

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.***

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,

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.

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 at all to assert any defenses." *Id.* (emphasis in original).

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.

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.

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.

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