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

[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.

[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

[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

[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.

[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*

[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