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

AMICUS BRIEF OF GOVERNOR LAURA KELLY

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

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TABLE OF CONTENTS AND AUTHORITIES

Page

INTERESTS OF THE *AMICUS*

Governor Kelly's interest in this case stems from her role as chief executive of the state and her duty to respond to emergencies that threaten the health and safety of Kansans. The Kansas Constitution vests the Governor with "supreme executive power," Art. 1, § 3, and the Kansas Emergency Management Act ("KEMA") declares that "[t]he governor shall be responsible for meeting the dangers to the state and people presented by disasters," K.S.A. 48-924(a).

This duty is Governor Kelly's most important obligation to the Kansans, and since March 2020 she has fulfilled that obligation using her executive authority under the Kansas Constitution and KEMA. She continues to meet this obligation, not only in response to the COVID-19 pandemic, but also for other emergencies threatening Kansans, such as wildfires and droughts (see March 21, 2021 proclamation and Executive Order 21-26). Moreover, Kansas is constantly at risk of new emergencies such as tornadoes and floods that may require action under the Governor's emergency powers. Indeed, Governor Kelly has dealt with numerous complicated – and controversial – public health threats during her administration, perhaps to a degree not experienced by her predecessors. Governor Kelly's experience navigating threats like the COVID-19 pandemic highlights two essential aspects of emergency management: (1) clear, simple guardrails are necessary to protect individual rights, and (2) adequate authority and flexibility is critical for state and local governments to effectively respond to dynamic, complicated public health threats. This case underscores just how important these aspects are to Kansas' emergency management system.

To strengthen these key elements, Governor Kelly has worked productively with government leaders and legislators to enact necessary updates to emergency management laws and processes. And her administration worked closely with legislators on Senate Bill 40, striving to update state law through enactments that would resolve issues raised during the COVID-19 pandemic without creating new problems. During S.B. 40 negotiations, legislators and the Governor's administration worked in good faith, with open communication to address concerns with various proposals. Like much legislation, S.B. 40 is a compromise; both sides made concessions to reach an acceptable agreement, and neither side supported every provision in the bill. Governor Kelly ultimately signed S.B. 40 into law despite strong concerns about some provisions. In particular, and as her administration maintained during legislative negotiations, S.B. 40's new "enforcement" provisions created problems for the emergency management system – especially for local government responses – without solving problems they were intended to resolve.

Many of the provisions in S.B. 40 impact Governor Kelly's exercise of power to respond to emergencies. Even the provisions purporting to relate to local emergency management ultimately affect the Governor and her emergency management duties, because the entire system is so intertwined – if local governments cannot respond effectively to an emergency, a local issue may become a challenge for surrounding communities and the state as a whole. Governor Kelly has a strong interest in the status and application of the emergency management laws at issue in this case.

ARGUMENT AND AUTHORITIES

Senate Bill No. 40, enacted in response to the COVID-19 pandemic, purported to update the Kansas Emergency Management Act ("KEMA") – a worthy cause, deserving the cooperative effort of the Kansas Legislature and Governor Kelly. See S.B. 40(1)(a)(1). S.B. 40 makes many changes to existing law, and not all changes are at issue in this lawsuit, nor should they be subject to challenge. See Part II infra. S.B. 40 includes provisions that can and should remain in place, but certain provisions raise significant constitutional concerns.

In enacting S.B. 40, the legislature adopted new provisions, primarily procedural in nature, that gave broad standing to anyone who objected to emergency orders adopted by the Governor and some local government entities. Worse, S.B. 40's new procedures impermissibly imposed unprecedented and burdensome procedures and standards on the Governor, local government entities, and the courts. See S.B. 40 Sections 1(d)(1), 6(g)(1), 8(e)(1), and 12(d)(1) of the law. By their plain language, these provisions:

- permit any party who self-identifies as having been "aggrieved" by an emergency directive to file a civil action in district court,
- require that the court hold a hearing within 72 hours,
- require the court to render a decision within 7 days of the hearing,
- require the court to apply a strict-scrutiny standard to the challenged directive in favor of the "aggrieved" party, and
- authorize a default judgment in favor of the "aggrieved" party if the district court fails to act within the time frames.

Although the Attorney General and amici supporting him argue the case is moot, the reality of the situation belies this argument. Two petitions recently have been filed under the analogous provisions of Section 12, challenging public safety measures of

counties. *See* Appendix at 1 (Morris County Case No. No. MR-2021-CV-000013), at 9 (Johnson County Case No. 21CV04112). Not unlike this case, one challenges a school district mask policy that is implementing a county directive. See App. 1. Moreover, Blue Valley's amicus brief indicates that District continues to face pending litigation under Section 1(d)(1) for money damages, even though the original disaster declaration has expired, which aptly demonstrates one flaw in S.B. 40: it contains no limitation on the relief permitted for an "aggrieved" party. *AMICUS* BRIEF OF BLUE VALLEY at 7-8. These continuing events demonstrate the issues are not going away and a mootness finding in this case would only postpone, but not avoid, a ruling from this Court on the important Kansas constitutional questions presented here.

Respectfully, the issues are ripe; they are extremely important to local governments and the public safety. And they are currently replicating. Kansans would benefit greatly from this Court addressing these issues now. In the spirit of cooperation and pursuing the public good, Governor Kelly offers the following arguments on the challenged aspects of S.B. 40.

I. Some Provisions of S.B. 40 Likely Violate the Separation of Powers Doctrine and Exceed the Scope of the Legislature's Constitutional Authority.

"The doctrine of independent governmental branches is firmly entrenched in United States and Kansas constitutional law." *Solomon v. State*, 303 Kan. 512, 525, 364 P.3d 536, 545 (2015). The operation of Kansas' government is vested in three branches of government. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 882-83, 179 P.3d 366 (2008). "Each of the three branches of our government ... is given the powers and

functions appropriate to it." *Morrison*, 285 Kan. at 883. Additionally, [t]he Kansas Supreme Court has the authority and duty to preserve the constitutional division of powers against disruptive intrusion by one branch of government into the sphere of a coordinate branch of government." *Solomon*, 303 Kan. at 525, Syl. ¶ 11.

A. S.B. 40 Violates the Separation of Powers Doctrine.

The legislature likely exceeded its authority when it mandated a strict-scrutiny standard in S.B. 40 despite the absence of a fundamental right or suspect class at issue. By doing so, the legislature has usurped the judiciary's authority to determine these controversies and enter a final order. While the legislative branch "makes" the law, *Sebelius*, 285 Kan. at 883, "[c]ourts in Kansas are vested with judicial power, which is the 'power to hear, consider and determine controversies between rival litigants.'" *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 264 Kan. 293, 337, 955 P.2d 1136 (1998) (citing *State, ex rel., v. Mohler*, 98 Kan. 465, 471, 158 P. 408 (1916), *aff'd* 248 U.S. 112 (1918)).

This Court considers four factors when evaluating whether a statute violates the separation of powers: "(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." *Solomon*, 303 at 513, Syl. ¶ 12.

Here, the nature of power being exercised is two-fold: (1) the power to determine the applicable test or standard of review in a civil lawsuit; and (2) the power to maintain or control local schools. The first is clearly in general the judiciary's prerogative under

Article 3 of the Kansas Constitution, and the second is generally granted to local school boards—subject to direction and oversight by the State Board of Education—by Article 6 of the Kansas Constitution. In neither context is the Legislature given authority under Article 2. Under the second factor, the Legislature is attempting to exercise complete control over the judicial standard to be applied in these cases (with no basis in constitutional doctrine, as explained in the next section) and effectively to overwhelm or intimidate school districts and counties into not taking measures they might otherwise take for public safety reasons, as is amply demonstrated by the Blue Valley School District amicus brief. *AMICUS* BRIEF OF BLUE VALLEY at 3-5. As to the third factor—the objective—S.B. 40 effectively seeks to dictate the outcome of challenges brought under these provisions. Creating artificial urgency through a fast-track judicial proceeding compels courts to rule under duress or risk losing the ability to enter an order at all. When a statute requires that one party's requested relief be entered as an automatic default judgment, that statute does not permit courts to exercise traditional judicial authority.

The final factor – the practical result – is that S.B. 40 renders the courts but a speed bump on the way to a predetermined outcome that impacts much more than a simple personal exemption for an individual plaintiff on the basis of health status or the infringement of a particular constitutional right. Instead, S.B. 40 challenges are likely to result in county-wide injunctive relief and may include claims for money. S.B. 40 itself demands narrow tailoring by local governments during emergency responses to a disaster; however, its own enforcement provisions lack any tailoring.

B. The Legislature Lacked Authority to Impose a Strict-Scrutiny Standard Without a Fundamental Right or Suspect Class.

The legislature has no authority to impose a strict-scrutiny standard here, because there is no fundamental right at stake or a suspect class to protect. The legislature's overreach is underscored by its imposition of the most stringent constitutional standard on local governing bodies entitled to a large measure of self-control. S.B. 40's adoption of this standard of review in Sections 1(d)(1), 6(g)(1), 8(e)(1), and 12(d)(1) challenges traditional constitutional norms in the same way Congress did when it enacted the Religious Freedom Restoration Act ("RFRA"); the United States Supreme Court declared the RFRA unconstitutional in part in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Just as our Legislature has attempted to do here, with RFRA the United States Congress attempted to statutorily impose a strict-scrutiny standard on local governments in circumstances where federal constitutional law did not require or impose such a level of scrutiny. *See Boerne*, 521 U.S. at 516-17. The Supreme Court recognized that Congress was attempting to legislate around a decision it disagreed with, *see Employment Div. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990) (upholding a neutral, generally applicable law as applied to religious practice even in absence of compelling government interest), and to impose its own preferred constitutional standard on the States and local governments. Congress, the Court held, lacked the power to do this, although the Court did permit Congress to impose the higher standard on the federal government itself.

This Court often has stated that the Kansas Constitution adheres to the same or very similar separation of powers principles as the U.S. Constitution. *E.g., Sebelius*, 285

Kan. at 895-96. Thus, at most, the legislature here might conceivably adopt a RFRA-like statute that imposes a strict-scrutiny standard for state-level actors in limited cases. Indeed, the legislature has adopted the Kansas Preservation of Religious Freedom Act, K.S.A. 60-5301 *et seq.* But SB 40 is not remotely equivalent to the KPRFA.

Thus, the Attorney General's passing reference to the federal RFRA, REPLY BRIEF 7, as justification for SB 40's adoption of strict scrutiny across a wide range of circumstances is unavailing and misplaced. Unlike the federal RFRA, S.B. 40 imposes a strict-scrutiny standard (1) on *local government bodies* (except Section 6(g)(1)), (2) in a context without even a remote claim to a constitutionally protected interest,[1] (3) without any burden of proof or preliminary showing or limitation on the objector invoking the procedure—any "aggrieved" party who for any reason objects to a local government safety measure during the pandemic, such as alleging a mask rule interferes with their "civic activity" of "living," (*see* recent Petition challenging Morris County measure, attached as App. at 1), (4) without limiting the relief available, which may include money damages or a county-wide injunction rather than a simple individual exemption from the challenged policy, and (5) while placing the litigation burden entirely on the governing

[1] Notably, neither the Attorney General, nor any of the amici supporting his position, even attempt to identify a specific, concrete constitutional right, or any interests of the "aggrieved" parties here, *see e.g.*, BRIEF OF APPELLANT, *generally*, *AMICUS* BRIEF OF KANSAS JUSTICE INSTITUTE, *generally*, at most referring vaguely to "interests" without citation or explanation). SB 40 is not premised on freedom of religion claims, for example, already covered by the KPRFA.

body from the start of the proceeding. S.B. 40's adoption of a strict-scrutiny standard in these circumstances is unprecedented and contrary to constitutional norms.

C. The Legislature Contravened Kansas Administrative Law and Upended the Balance Between Itself and Local Government.

The statutorily mandated use of a strict-scrutiny standard is also inconsistent with Kansas administrative jurisprudence and prior decisions evaluating actions, orders, or policies implemented by a school board. *See, e.g., Blaine v. Bd. of Ed. Haysville Unified Sch. Dist. No. 261 Sedgwick Cty., Haysville*, 210 Kan. 560, 560, Syl. ¶ 6, 502 P.2d 693, (1972) ("In restricting conduct and appearance of students desiring an education, school regulations must have a *rational* purpose." (Emphasis added.)); *E.C. v. U.S.D. 385 Andover*, No. 18-1106-EFM, 2019 WL 1922173, at *4 (D. Kan. Apr. 30, 2019) ("To establish a prima facie case for violation of the IDEA's substantive FAPE requirement, a plaintiff must prove that the public agency responsible for providing education services to a disabled student failed to develop an IEP that was *reasonably calculated* to provide educational benefit to the student." (Emphasis added.)); *Montoy v. State*, 278 Kan. 769, 120 P.3d 306, 308, *supp.*, 279 Kan. 817, 112 P.3d 923 (2005) ("Although *the district court correctly determined that the rational basis test was the proper level of scrutiny*, it misapplied that test." (Emphasis added.)).

The Kansas Judicial Review Act ("KJRA") governs judicial review of agency actions. K.S.A. 77-621 (setting out highly deferential standard of review for administrative decisions); *see also Ryser v. State*, 295 Kan. 452, 458, 284 P.3d 337 (2012) (applying KJRA). Under this framework, the party challenging an agency action

bears the burden of proving its invalidity. *See In re Equalization Appeal of Wagnery*, 304 Kan. 587, 597, 372 P.3d 1226 (2016) (tax appeal). Moreover, when a court reviews the decision of a non-state agency acting in a judicial or quasi-judicial function, review is even more limited: the court considers only whether the agency acted within the scope of its authority. *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1129, 307 P.3d 125 (2013). Courts are generally extremely deferential to agency decisions, in large part precisely because they recognize an agency's closer proximity to and expertise on the subject matter. The legislature's use of a strict-scrutiny standard in S.B. 40, with the burden on the local government body, is also unprecedented in this respect. *See* K.S.A. 77-621(a) (recognizing exemptions to KJRA).

D. The "Heckler's Veto" Provisions of S.B. 40 also Undermine the Legislature's Constitutional Duties to the Kansas Educational System.

The legislature is constitutionally mandated to "provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law." Kan. Const. art. VI, § 1; see also Gannon v. State, 298 Kan. 1107, 1128, 319 P.3d 1196 (2014). But giving dissenters the ability to divert educational resources and frustrate the adoption and implementation of public safety measures does not advance that Article 6 obligation. Instead, S.B. 40's procedures have wrought havoc on some school districts by giving a prominent and powerful platform to objectors while completely ignoring the countless employees, parents, guardians, and students who support and are positively impacted by county and

district safety measures. *See AMICUS* BRIEF OF BLUE VALLEY 1-6 (describing impact of S.B. 40 on district operations). S.B. 40 operates as a classic "heckler's veto," effectively frustrating the will of the majority, and hanging like a Sword of Damocles over Kansas local governing bodies. It completely ignores the—at least equal—interests and rights of all the parents, students, employees, and citizens who support and are positively impacted by local safety measures. All Kansans have equal opportunities for input on the public safety measures being debated and sometimes adopted by their local governments: participation in the meetings of those bodies and the ballot box. Under Article 6, the Legislature cannot fulfill its constitutional duty by enacting legislation that emphasizes the personal opinions of some students and parents while ignoring hosts of others.

E. S.B. 40 Impedes Constitutionally Mandated Local Control Over the Maintenance and Control of Local Schools.

Under the Kansas Constitution, local school boards are empowered to maintain and control their districts. *Matter of C.M.J.*, 259 Kan. 854, 860-61, 915 P.2d 62 (1996) (recognizing "broad authority and responsibility to control the educational setting"). Moreover, this Court has recognized that legislation should not "interfere[]" or "hamstring[] the local school board in performing its constitutional duty to maintain, develop, and operate" local schools. *Gannon*, 298 Kan. at 1128. The intent of Article 6 is clear from its history: "local control is important to maintaining and developing a democratic society." *The Education Amendment to the Kansas Constitution*, Publication No. 256, December 1965 Kansas Legislative Council, page 29. The Education Amendment was intended to "provide constitutional guarantees of local control of local

schools." *Educational Amendment* at page iii. For at least these reasons, S.B. 40 intrudes on territory committed to local control, causing chaos in the local schools and impermissibly taxing judicial resources.

F. The Attorney General's Analogies to other Statutes with Expedited Timelines are Inapt.

The Attorney General attempts to analogize S.B. 40's judicial timeline provisions to the speedy trial statute and statutes that require expedited judicial review in certain situations. *See* APPELLANT'S BRIEF 19 (listing provisions). But the analogies are inapt. The right to a speedy trial is an explicit constitutional right. S.B. 40 protects no such right. And the other expediting hearing statutes the Attorney General relies upon all involve one of the most fundamental liberties—freedom from custody or restriction on physical movements by the state—which again SB is not protecting.

- Custody and Visitation of Children. K.S.A. 38-2243(b) (addressing visitation of children in protective custody because there is cause to believe the child poses a danger, that his or her health or welfare is in jeopardy, that the child has been trafficked or otherwise exploited, or is experiencing a mental health crisis);

- Custody and Visitation of Children. K.S.A. 38-2273(b) (appeal from an order enforcing parenting time orders in proceedings "concerning a child who may be a child in need of care")); *see In re L.C.W.*, 42 Kan. App. 2d 293, 297, 211 P.3d 829 (2009) (recognizing purpose of expedited timeline is "to further the end that each child shall receive the care, custody, guidance, control, and discipline, preferably in the child's own home, as will best serve the child's welfare and the best interests of the State");

- Domestic violence. K.S.A. 60-3106; *Trolinger v. Trolinger*, 30 Kan. App. 2d 192, 192, Syl. ¶ 1, 42 P.3d 157 (2001) (recognizing that such orders "are normally transitory in nature, frequently develop in emergency situations, and may involve risk to the lives of some or all of the parties involved."); and

- Sexually violent predators. K.S.A. 59-a05(b); *see In re Hunt*, 32 Kan. App. 2d 344, 364-65, 82 P.3d 861 (2004) (recognizing that "[t]he public has an enormous interest in seeing that persons who qualify as sexually violent predators are removed from society and treated in appropriate facilities.").

II. Any Unconstitutional Provisions of S.B. 40 are Severable from the Remainder of the Law, and the Legislative Intent to Have a Severance Remedy is Clear.

"[T]his court has considered severing a provision from a statute if to do so would make the statute constitutional and the remaining provisions could fulfill the purpose of the statute. Each time, this court has emphasized that the determination of whether the provision may be severed 'depends on the intent of the legislature.'" *Morrison*, 285 Kan. at 913 (listing cases considering severance). "[T]he presence of a severability clause is direct evidence of legislative intent." *Gannon v. State*, 304 Kan. 490, 520, 372 P.3d 1181, 1199 (2016). "If from examination of a statute it can be said that the act would have been passed without the objectional portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand." *Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan*, 303 Kan. 844, 844, Syl. ¶ 7, 370 P.3d 1170, (2016) (Citations omitted.).

Here, the Legislature's intent could not be clearer, as Section 14 of S.B. 40 states:

> The provisions of this act are severable. If any portion of this act is declared unconstitutional or invalid, or the application of any portion of the act to any person or circumstance is held unconstitutional or invalid, the invalidity shall not affect other portions of the act that can be given effect without the invalid portion or application, and the applicability of such other portions of the act to any person or circumstance shall remain valid and enforceable.

Governor Kelly agrees with the Attorney General that any offending provisions of S.B. 40 are severable from the remainder of the law, and thus on the question of severability

respectfully disagrees with the Honorable District Judge below, as well as the Appellee. There are many other provisions in S.B. 40 that have no structural or legal connection or relationship to the challenged provisions; those provisions can operate effectively and as intended without the offending provisions. There is no need to strike those provisions.

That said, severability raises the question of just what provisions of S.B. 40 should be invalidated. The provisions which the Court could and likely should strike because they are interrelated and violate the Kansas Constitution are the imposition of the strict-scrutiny standard, the short timelines for the courts to act, and the lack of any limitations on the relief available (permitting county-wide injunctive relief and claims for money damages). Those provisions in Sections 1(d)(1), 6(g)(1), 8(e)(1), and 12(d)(1) are all problematic, with the only possible exception being the application of a strict scrutiny standard in Section 6(g)(1) specifically with respect to "religious" activity, the only of the sections to have such a specification, which then makes it arguably like the federal RFRA and the KPRFA. (The 72-hour and 7-day provisions contained in Section 6(g)(1) are still constitutionally suspect, even with the reference to "religious" activity.") Otherwise, these provisions are being imposed in circumstances where no constitutional right or interest is at stake on behalf of the objector. To the contrary, the procedure is harming a large group of citizens, students, parents, school staff and employees arguably in violation of the Legislature's constitutional obligations to the *entire* Kansas educational system under Article 6, Section 1. There is no legal or practical reason why these offending provisions cannot be severed from the remainder of S.B. 40.

CONCLUSION

S.B. 40 is important legislation that makes needed updates to the Kansas Emergency Management Act and related laws. Many of its provisions are improvements to previous law, have not been challenged, and should be permitted to remain operative. But the "heckler's veto" provisions in Sections 1(d)(1), 6(g)(1), 8(e)(1), and 12(d)(1), are constitutionally problematic. The United States Supreme Court long ago rejected the very sort of principle upon which these provisions of S.B. 40 rely: "We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state." Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 38 (1905). All Kansans have equal opportunities for input on the public safety measures being debated and sometimes adopted by their local governments: they can participate in the meetings of those bodies and vote at the ballot box. S.B. 40 unconstitutionally skews the traditional system for giving Kansas citizens their voice.

Among S.B. 40's constitutional infirmities are the imposition of a strict-scrutiny standard, the adoption of extremely short timelines imposed on the courts, and an unlimited scope of available remedies. This Court should determine that these provisions violate the Kansas Constitution, but that they can be severed from the rest of S.B. 40.

Dated: September 24, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed electronically on this 24th day of September 2021, which sent notification to all counsel of record. Additionally, a courtesy copy by personal service was sent via email to the following counsel of record:

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Appendix

ELECTRONICALLY FILED
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CLERK OF THE MORRIS COUNTY
CASE NUMBER: MR-2021-CV-000013
PII COMPLIANT

IN THE DISTRICT COURT MORRIS COUNTY
TENTH JUDICIAL DISTRICT OF KANSAS

NEIL LITKE;	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.
	)	
THE BOARD OF COUNTY COMMISSIONERS OF MORRIS COUNTY, KANSAS *in their official capacity.*	)	
	)	
Defendants.	)	
	)	

PETITION

(Under 2021 Senate Bill 40; Supreme Court Administrative Order 2021-RL-032)

COMES NOW, Petitioner Neil Litke, brings this action pursuant to 2021 Senate Bill 40 and Supreme Court Administrative Order 2021-RL-032 as an aggrieved person under the Morris County Requirements for Face Coverings issued August 4, 2021 (the "Order"), stating and alleging as follows:

1. Petitioner Neil Litke resides in Morris County. Petition resides at 112 S. Rockhill St., Council Grove, Kansas 66846.

2. Petitioner is aggrieved by the Morris County Requirements for Face Coverings, an Order issued by a Local Health Officer and approved by the Board of County Commissioners of Morris County which qualifies as an order under Senate Bill 40, Sec. 12(d). The Order was issued, approved, and filed on August 4, 2021 within 30 days of the filing of this Petition.

3. A copy of the Order is attached hereto as **Exhibit A**.

4. The Order mandates the wearing of face masks which expressly places the order under the purview of Senate Bill 40, Sec. 12(b)(1)(2).

5. In addition, the Petitioner is engaged in the civic activity of living and conducting business in Morris County. Petitioner is compelled to wear a face mask in numerous instances throughout each day. Petitioner served in the United States Marine Corps. and believes strongly in freedom and personal choice. Petitioner Litke is aggrieved by the broad nature of the Order and wishes to see Morris County abide by Senate Bill 40, Section 12 and narrowly tailor the Order. A narrowly tailored Order would have less impact on Petitioner's daily life. Furthermore, Petitioner is particularly aggrieved by the semi-permanent nature of the Order.

6. The Order states it "will remain in effect until rescinded by the Morris County Health Officer"—creating a mask mandate with no foreseeable expiration and which potentially continues perpetually. The Petitioner requests the Court narrow the effective date of the Order such that it must be reviewed by the Board of Morris County Commissioners (the "Board") every 30 days due to the fact that the Local Health Officer, the Board, and the Court cannot know possibly know the applicable health conditions, least restrictive means, or even compelling governmental interest *ad infinitum*. Accordingly, a 30-day order is more narrowly tailored than one continuing at the Local Health Officer's sole discretion, but still allows the Board adequate time to judge changing conditions. Accordingly, a 30-day order is more narrowly tailored than one continuing at the Local Health Officer's sole discretion, but still allows the Board adequate time to judge changing conditions. Moreover, because the Board does not know the conditions, compelling interest, or least restrictive means that may be most prudent 31 days after the issuance of the initial order, the Order as written is by definition more restrictive than necessary. Because the Order lasts longer than the period under SB 40 during which an aggrieved party may ask for court review, regardless of the conditions on day 31 or after, the Order is not the least restrictive means by which the Board may achieve the purpose stated in the Order.

7. Additionally, the Order is not the least restrictive means to accomplishing the purpose stated in the Order because:

A. The Order is universal, unlike similar orders in Douglas County or Johnson County that only apply to certain age groups.

B. Unlike orders in Johnson County and Douglas County, the Order applies to outdoor activity.

C. The Order lacks any exemption for religious activity, which has been granted in other order such as Douglas and Johnson counties.

D. The Order lacks any exemption for strenuous physical activity or indoor exercise.

E. The Order lacks any exemption for swimming.

F. There is no exemption for those working in private office space that can be closed.

G. The Order requires all Morris County businesses and organizations to "require all employees, customers, visitors, members, or members of the public to wear a mask" while inside. This provision deputizes private business owners into enforcement arms for the Order, even if doing so would be detrimental to their business or organization. In Petitioner's experience since the issuance of the Order.

8. No other cases have been filed by the Petitioner related to the Order.

9. The Petitioner acknowledges the Judgement and Final Order After Intervention issued in Case Number 2021-CV-2385 issued by the Johnson County District Court and notes that it was stayed by the Kansas Supreme Court in Case Number 124205. Given the District Court's Judgement and Final Order After Intervention in 2021-CV-2385, the Petitioner hereby

WAIVES strict adherence to the statutory timelines outlined in SB 40, including but not limited to the issuance of a written decision within seven days of hearing, but respectfully requests that this matter be heard as soon as possible by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court issue an Order narrowly tailoring the Morris County Requirements for Face Coverings issued August 4, 2021and limit its effective period to 30 days without action by the Board to extend the mandate.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Respectfully submitted this 3rd day of September 2021.

KRIEGSHAUSER NEY LAW GROUP

By:

/s/ Ryan A. Kriegshauser

Ryan A. Kriegshauser, KS Bar No. 23942
Joshua A. Ney, KS Bar No. 24077
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ATTORNEYS FOR THE PETITIONER

Morris County KANSAS

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Morris County Requirements for Face Coverings

POSTED ON: AUGUST 4, 2021 - 4:20PM

The Morris County Health officer has issued the following order beginning at 12:01am on August 7, 2021. This order will remain in effect until rescinded by the Morris County Health Officer. This order may be expanded and or modified by the health officer as circumstances dictate in order to mitigate the spread of COVID-19 in Morris County.

Any person in Morris County shall cover their mouth and nose with a mask or other face covering when they are in the following situations:

- Inside, or in line to enter, any indoor public space
- Obtaining services from the healthcare sectors, including but not limited to, a hospital, pharmacy, medical clinic, laboratory, physician or dental office, or veterinary clinic
- Riding on public transportation or ride-sharing vehicle
- While outdoors in public spaces and unable to maintain a 6-foot distance between individuals (not including individuals who reside together) with only infrequent or incidental moments of closer proximity

EXHIBIT A

All businesses or organizations in Morris County must require all employees, customers, visitors, members, or members of the public to wear a mask or other face covering inside public spaces.

The following are exempt from wearing masks or other face coverings in the situations described above:

- Persons under the age of five.
- Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering-this includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance
- Persons who are deaf or hard of hearing, or communicating with a person who is deaf or hard of hearing, where the ability to see the mouth is essential for communication
- Persons for whom wearing a face covering would create a risk to the person related to their work, as determined by local, state, or federal regulators or workplace safety guidelines
- Persons who are obtaining a service involving the nose, mouth, or face for which temporary removal of the face covering is necessary to perform the service
- Persons who are seated at a restaurant or other establishment that offers food or beverage service, while they are eating or drinking, provided they maintain a 6-foot distance between individuals (not including individuals who reside together or are seated together) with only infrequent or incidental moments of closer proximity.
- Athletes who are engaging in an organized sporting competition.
- Persons who are engaged in an activity that a professional or recreational association, regulatory entity, medical association, or other public-health-oriented entity has determined cannot be safely conducted while wearing a mask or other face covering
- Persons engaged in any lawful activity during which wearing a mask or other face covering is prohibited by law

Businesses, Organizations, or facilities may impose more strict regulations than are ordered by the Morris County Health Officer, but may not be less restrictive.

Daniel Frese, MD
Morris County Health Officer

Morris County, Kansas
501 W Main Street
Council Grove, KS 66846
Phone: 620-767-5518

Hours
Monday - Friday: 8:00AM - 5:00PM
Closed Saturdays and County Holidays

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IN THE DISTRICT COURT JOHNSON COUNTY
TENTH JUDICIAL DISTRICT OF KANSAS

M. M. C., by and through her next friend, B. C., her parent;	)	
Petitioner,	)	
v.	)	Case No.
THE BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, KANSAS *in their official capacity.*	)	
Defendants.	)	

PETITION
(Under 2021 Senate Bill 40; Supreme Court Administrative Order 2021-RL-032)

COMES NOW, Petitioner M. M. C., a minor child, by and through her next friend and natural and legal parent, B. C., brings this action pursuant to 2021 Senate Bill 40 and Supreme Court Administrative Order 2021-RL-032 as an aggrieved person under Johnson County Board of Health Order No. 001-21 (the "Order"), stating and alleging as follows:

1. Petitioner M. M. C. resides in Johnson County and attends middle school in the Blue Valley School District. Petitioner M. M. C. is a minor child. Accordingly, efforts are being taken to maintain her privacy as a minor child.

2. Petitioner attends school in a building where children in 6th or lower grades also attend school and are not physically separated from higher grades throughout the school day.

3. The Petitioner is aggrieved by Johnson County Board of Health Order No. 001-21, an Order issued by a Local Health Officer and approved by the Board of County Commissioners of Johnson County which qualifies as an order under Senate Bill 40, Sec. 12(d).

Commissioners of Johnson County which qualifies as an order under Senate Bill 40, Sec. 12(d). The Order was issued, approved, and filed on August 5, 2021 within 30 days of the filing of this Petition.

4. A copy of the Order is attached hereto as **Exhibit A**.

5. The Order mandates the wearing of face masks which expressly places the order under the purview of Senate Bill 40, Sec. 12(b)(1)(2).

6. In addition, the Petitioner is engaged in the civic activity of attending school and obtaining a primary education. The Order substantially inhibits the Petitioner's civic activity by interfering with Petitioner M. M. C. ability to complete schoolwork, interact with her friends, and receive instruction from her teachers. Disputes over the "proper" wearing of face masks have resulted conflict between school officials and M. M. C. which was not present prior to the imposition of such masks. Further, school enforcement of the order has caused teachers and administrators to discriminate against and punish unmasked students that otherwise have had no disciplinary action. Such enforcement activity has placed M. M. C. in fear of immanent school discipline during the school day. The school enforcement of the Order against M. M. C. and other unmasked students is deleterious to M. M. C.'s educational civic activity and emotional and mental wellbeing.

7. The Order extends nearly a year, from August 9, 2021 until May 31, 2022 (295 days). The Petitioner requests the Court narrow the effective date of the Order such that it must be reviewed by the Board of Johnson County Commissioners (the "Board") every 30 days, due to the fact that the Local Health Officer, the Board, and the Court cannot know possibly know the applicable conditions, least restrictive means, or even compelling governmental interest regarding the subject matter of the Order 295 days in advance. Accordingly, a 30-day order is

more narrowly tailored than a 295-day order but still allows the Board adequate time to judge changing conditions. Moreover, because the Board does not know the conditions, compelling interest, or least restrictive means that may be most prudent on May 30, 2022 or even September 9, 2021 (31 days after the issuance of the initial order), the Order as written is by definition more restrictive than necessary. Because the Order lasts longer than the period under SB 40 during which an aggrieved party may ask for court review, regardless of the conditions on day 31 or after, the Order is not the least restrictive means by which the Board may achieve the purpose stated in the Order. It is further noted that the Order, which lasts for 295 days, was the first county mask mandate order to be issued after SB 40 (and its 30 day challenge period) went into effect, while pre-SB 40 health orders in Johnson County were substantially shorter than 295 days.

8. No other cases have been filed by the Petitioner related to the Order.

9. The Petitioner acknowledges the Judgement and Final Order After Intervention issued in *Butler, et. al. v. Shawnee Mission School District Board of Education*, Case Number 2021-CV-2385, issued by the Johnson County District Court and notes that it was stayed by the Kansas Supreme Court in Case Number 124205 on August 24, 2021. Given the District Court's Judgement and Final Order After Intervention in 2021-CV-2385, the Petitioner hereby WAIVES strict adherence to the statutory timelines outlined in SB 40, including but not limited to the issuance of a written decision within seven days of hearing, but respectfully requests that this matter be heard as soon as possible by the Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court issue an Order narrowly tailoring Johnson County Board of Health Order No. 001-21 to limit its effective period to 30 days without action by the Board to extend the mandate.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable.

Respectfully submitted this 3rd day of September 2021.

KRIEGSHAUSER NEY LAW GROUP

By:

/s/ Ryan A. Kriegshauser
Ryan A. Kriegshauser, KS Bar No. 23942
Joshua A. Ney, KS Bar No. 24077
Alan M. Vester, KS Bar No. 27892
15050 W. 138th St., Unit 4493
Olathe, KS 66063

ATTORNEYS FOR THE PETITIONER

JOHNSON COUNTY BOARD OF HEALTH ORDER NO. 001-21

******

Applicable within the entirety of Johnson County, Kansas

This Public Health Order is issued by the Board of County Commissioners of Johnson County, Kansas, sitting as the County Board of Health, on August 5, 2021 and is effective the 9th day of August 2021, at 12:01 A.M. to ensure elementary level schools in Johnson County can safely provide in-person learning and to slow the spread of COVID-19 in Johnson County elementary level schools, pursuant to the authority provided in K.S.A. 65-119 and other applicable laws or regulations.

The Board, sitting and acting as the County Board of Health, upon a motion duly made, seconded, and carried adopted the following Order, to-wit:

******

WHEREAS, COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death among some who are infected; and

WHEREAS, the United States Department of Health and Human Services declared a public health emergency for COVID-19 beginning January 27, 2020, with now more than 34,722,631cases of the illness and more than 609,853 deaths as a result of the illness across the United States; and

WHEREAS, on March 19, 2020, the Board of County Commissioners of Johnson County issued a state of local disaster emergency declaration, which was renewed and extended on May 28, 2020, and which remains in place at the time of this Order; and

WHEREAS, as of this date, in Kansas there have been 330,932 reported positive cases of COVID-19 spread among all 105 counties, including 5,247 deaths; and

WHEREAS, COVID-19 has resulted in 48,983 reported positive cases of COVID-19 in Johnson County and the deaths of 679 Johnson County residents; and

WHEREAS, the highly transmissible Delta variant of COVID-19 is now the dominant strain in Johnson County, resulting in a rapid increase in new cases and numerous outbreaks associated with summer camps and school-age programs; and

WHEREAS, children under the age of 12 are not currently eligible for vaccines and approximately less than forty percent (40%) of children aged 12-17 years in Johnson County have been fully vaccinated against COVID-19; and

WHEREAS, K-12 students benefit from in-person learning and interactions with others; and

WHEREAS, under state law, children between the ages of 7 and 18 are required to attend school; and

WHEREAS, safely returning to in-person classes and keeping public and private K-12 schools open in Johnson County is of the highest priority for students, parents, schools, and the entire community; and

WHEREAS, Centers for Disease Control and Prevention ("CDC") now recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools regardless of vaccination status; and

WHEREAS, wearing face masks while indoors at school will protect the health of Johnson County elementary level students while they are awaiting vaccinations; and

WHEREAS, wearing a mask or other face covering in school gets and keeps children in school and is an effective means to protect students and mitigate the spread of COVID-19 while in school; and

WHEREAS, the intent of this Order is not to deprive any person or entity of any rights protected by the United States Constitution, the Kansas Constitution, or any other law, but merely to set forth restrictions which would best protect Johnson County schools, students, faculty, and staff against the community spread of COVID-19; and

WHEREAS, the Board of County Commissioners of Johnson County, as the County Board of Health, and the Local Health Officer are authorized and required, pursuant to K.S.A. 65-119, to immediately exercise and maintain supervision over known or suspected cases of any infectious or contagious disease during its continuance and to see that all such cases are properly handled, and the Local Health Officer is to use all known measures to prevent the spread of any infectious, contagious, or communicable disease;

WHEREAS, the Local Health Officer is appointed by the Board of County Commissioners of Johnson County pursuant to K.S.A. 65-201, and the Local Health Officer proposes and recommends that masks or other face coverings be worn by students through and including 6th grade while inside school buildings to slow the spread of COVID-19 in Johnson County schools; and

WHEREAS, Johnson County Department of Health and Environment (JCDHE) works in partnership with Johnson County public and private schools to keep our schools open so that our children can learn and benefit from interactions with others. JCDHE will collaborate with and provide guidance to schools on the wearing of masks while in school; and

WHEREAS, for the aforementioned and other reasons, and in recognition and furtherance of the County's responsibility to provide for and ensure the health, safety, security, and welfare of the people of Johnson County, requiring that masks or other face coverings be worn by students through and including 6th grade while inside school buildings is a highly effective measure that can be taken to slow and reduce the spread of COVID-19 in our schools and community; and

NOW, THEREFORE, BE IT ORDERED by the Board of County Commissioners of Johnson County, Kansas, sitting and acting as the County Board of Health, that:

Section I. Maintaining Healthy School Environments for Elementary Level Students

1. To ensure that schools may operate as safely as possible, public and private schools for students up to and including 6th grade shall require the following:

a. Masks or other face coverings are required for all children while inside a school building where any students through and including 6th grade attend class, unless actively eating or drinking. This requirement includes children in higher grades who attend school in buildings where children in 6th or lower grades also attend school unless 6th graders are physically separated from higher grades throughout the school day.

b. Masks or other face coverings are required for all faculty, staff, and visitors while inside a school building where any students through and including 6th grade attend class, unless actively eating or drinking.

c. Unless otherwise required by the school, children, faculty, staff, and visitors do not need to wear masks when outdoors on school property. This includes students, faculty and staff participating in elementary level recess.

d. All bus riders must wear a mask when riding on a school bus unless documentation has been submitted to the school for a medical mask exemption.

2. The following individuals are exempt from wearing masks or other face coverings while inside school buildings:

a. Persons with a medical condition, mental health condition, or disability that prevents wearing a face covering. This includes persons with a medical condition for whom wearing a face covering could obstruct breathing or who are unconscious, incapacitated, or otherwise unable to remove a face covering without assistance.

i. For students, faculty and staff, documentation of the above condition should be provided to the appropriate school officials pursuant to school guidelines.

b. Persons communicating with a person who is deaf or hard of hearing, where the ability to see the mouth is essential for communication.

c. Persons engaged in religious services, ceremonies or activities.

d. Persons engaged in activities and athletics inside school buildings, who should follow KSHSAA and/or school guidelines.

3. "Mask or other face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is simply wrapped around the lower face. A mask or other face covering can be made of a variety of synthetic and natural fabrics, including cotton, silk, or linen. A mask or other face covering may be factory-made, sewn by hand, or can be improvised from household items such as scarfs, bandanas, t-shirts, sweatshirts, or towels.

Section II. Lawful Order. This Order is a lawfully issued order pursuant to K.S.A. 65-202 and K.S.A. 65-119(a) and is also a "public health directive" as identified in KSA 60-5502. This Order shall apply to all public and private K-12 schools within Johnson County. The Board of Education for each unified school district within Johnson County and the respective governing

body of each K-12 private school within Johnson County shall be responsible for enforcement of this Order.

Section III. Review by Board of County Commissioners. The Board of County Commissioners may review, amend, or revoke this Order at any time.

Section IV. Severability. If any portion of this Order is found or determined to be invalid, such finding, or determination shall only affect the portion of the Order that is at issue and shall not affect the validity of the remainder of the Order.

Section V. Effective Date; Conclusion. This Order is effective at 12:01 A.M. on Monday, the 9th day of August 2021, and shall remain in effect through 11:59 P.M. on May 31, 2022, unless it is amended, revoked, or replaced.

IT IS SO ORDERED this 5th day of August, 2021.

BOARD OF COUNTY COMMISSIONERS
OF JOHNSON COUNTY, KANSAS

Ed Eilert, Chairman

ATTEST:

Lynda Sader
Deputy County Clerk

APPROVED AS TO FORM:

Peggy A. Trent
Chief Counsel

Approved 5-2 (CO MA)

FILED
AUG 05 2021
DEPUTY COUNTY CLERK
JOHNSON COUNTY KANSAS