Docket No. 21-124205-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

KRISTEN BUTLER and SCOTT BOZARTH
Plaintiffs

v.

SHAWNEE MISSION SCHOOL DISTRICT BOARD OF EDUCATION
Defendant/Appellee.

ATTORNEY GENERAL DEREK SCHMIDT
Intervenor/Appellant

BRIEF OF APPELLEE SHAWNEE MISSION SCHOOL DISTRICT BOARD OF EDUCATION

Appeal from the District Court of Johnson County, Honorable David W. Hauber, Judge, District Court Case No. 2021-CV-2385

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NATURE OF THE CASE

This civil action involves a challenge filed in district court on May 28, 2021, by Plaintiffs against Defendant Shawnee Mission Unified School District No. 512, Johnson County, Kansas ("Shawnee Mission School District"), pursuant to SB 40 § 1(d). Petition, R.O.A. Vol. 1 pp. 4-48. Plaintiffs sought to challenge a May 6, 2021 email from Defendant Shawnee Mission School District's superintendent of schools responding to an untimely request by Plaintiffs for a hearing under Section 1(c) challenging Defendant's Board of Education's Resolution on Affirming Reopening Plan adopted July 27, 2020. *Id.* Following a hearing held on June 2, 2021, the district court entered its provisional Order on Plaintiffs' Senate Bill 40 Request for Relief with Notice to the Attorney General on June 8, 2021 ("Preliminary Order"). R.O.A. Vol. 1 pp. 51-71. Following intervention by the Attorney General, the district court entered its Judgment and Final Order After Intervention by the Kansas Attorney General on July 15, 2021 ("Judgment" or "Final Order"). R.O.A. Vol. 2 pp. 66-92. No appeal filed from this Judgment by Plaintiffs. Instead, the Attorney General, as intervenor, has filed an appeal seeking appellate review only of the district court's determination that SB 40 is unconstitutional and asking this Court to "reverse the district court and order this case dismissed for lack of jurisdiction." Aplt. Brf. p. 24; Notice of Appeal, R.O.A. Vol. 1 pp. 72-73.

STATEMENT OF ISSUES

As Appellant's statement of the issues fails to account for harmless error, Appellee would restate and reorder the issues as follows:

I. Did the district court err by raising the issue of the constitutionality of SB 40 and utilizing the procedure set forth in K.S.A. 75-764(b)(2) to give the Attorney General an opportunity to appear in the case and present arguments?

II. Did the district court err by concluding that this action was not moot?

III. Did the district court err by concluding it had jurisdiction to consider the constitutionality of SB 40?

IV. Did the district court err by finding SB 40 to be unconstitutional?

V. Did the district court err by not severing portions of SB 40?

STATEMENT OF FACTS

On March 12, 2020, the Kansas Governor declared a state of disaster emergency ("Governor's Declaration"). The Governor's Declaration was in effect from March 12, 2020, to June 15, 2021.[1] On March 13, 2020, the Board of County Commissioners of Johnson County, Kansas, (the county in which Defendant Shawnee Mission School District is located) issued a state of local disaster emergency declaration which remains in effect. *See* https://www.jocogov.org/press-release/county-management/johnson-county-declares-state-emergency. On March 16, 2021, the Kansas legislature approved Senate Bill 40 (effective March 25, 2021).

On May 28, 2021, pursuant to SB 40 Section 1(d), Plaintiffs filed a civil action seeking to challenge a May 6, 2021 email from Defendant Shawnee Mission School District's superintendent of schools responding to an untimely request by Plaintiffs for a

[1] The LCC granted a final extension through June 15, 2021, at its meeting on May 28, 2021, which is available at https://www.youtube.com/watch?v=obsRPZuioo0&t=3s.

hearing under Section 1(c) of SB 40 challenging Defendant's Board of Education's Resolution on Affirming Reopening Plan adopted July 27, 2020. Petition, R.O.A. Vol. 1 pp. 4-48. Defendant Shawnee Mission School District filed a motion to dismiss which was heard on June 2, 2021. R.O.A. Vol. 2 pp. 1-10. After taking the matter under advisement, the district court issued its Preliminary Order on June 8, 2021, where, *inter alia*, it questioned the constitutionality of SB 40 and invited the Attorney General to intervene. R.O.A. Vol. 1 pp. 51-71.

Following intervention by the Attorney General, the district court entered its Judgment and Final Order on July 15, 2021. R.O.A. Vol. 2 pp. 66-92. No appeal filed from this Judgment by Plaintiffs. Instead, the Attorney General, as intervenor, has filed an appeal seeking appellate review only of the district court's determination that SB 40 is unconstitutional and asking this Court to "reverse the district court and order this case dismissed for lack of jurisdiction." Aplt. Brf. p. 24; Notice of Appeal, R.O.A. Vol. 1 pp. 72-73.

ARGUMENTS AND AUTHORITIES

I. The district court did not err and instead acted properly within its authority to consider *sua sponte* the constitutionality of SB 40.

A. Standards of Review

Whether a district court erred in raising an issue *sua sponte* is reviewed for abuse of discretion. *State v. Carrasco*, 380 P.3d 721 (Kan. App. 2016). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Id.*

B. The district court properly raised the issue of the constitutionality of SB 40 and used the procedure set forth in K.S.A. 75-764(b)(2) to give the Attorney General an opportunity to appear in the case and present arguments.

Kansas courts are afforded the power to raise issues *sua sponte*, and there are numerous examples of Kansas courts doing so. *See, e.g.*, *Merrills v. State*, 243 P.3d 382 (Kan. App. 2010) (finding that "the ends of justice [were] best served" by considering *sua sponte* whether counsel was ineffective); *Tolen v. State*, 285 Kan. 672, 676, (2008) (recognizing the court's "authority to address issues we have raised *sua sponte*" and resolving an issue that resulted from the court's questioning during oral argument concerning whether a statutory amendment was constitutional); *State v. Washington*, 275 Kan. 644, 677–80, 68 P.3d 134 (2003) (considering *sua sponte* the effectiveness of defense counsel at sentencing, vacating defendant's sentence, and remanding for resentencing); *LaBerge v. State*, 1993 WL 13965871, at *1 (Kan. App. 1993) (using the "court's power to raise an issue *sua sponte*").

Case law clearly delineates when a court may exercise its power to raise an issue *sua sponte*, and when raising an issue *sua sponte* would constitute an abuse of discretion. The power to raise issues *sua sponte* may be employed where a court identifies a jurisdictional issue that could impact its ability to hear a case and issue a ruling. *Frontier Ditch Co. v. Chief Engineer of Div. of Water Resources*, 237 Kan. 857, 864, (1985) (a court "may raise issues on its own motions", specifically jurisdictional questions); *Klassen v. Kansas Dep't of Revenue*, 196 P.3d 1232 (Kan. App. 2008) (subject matter jurisdiction can be raised by a court *sua sponte* at any time). The power

also may be used to address issues in exceptional circumstances, such as where consideration of an issue is necessary to serve the ends of justice or to prevent the denial of fundamental rights. *State v. Puckett*, 230 Kan. 596, 600–01, (1982); *State v. Adams*, 283 Kan. 365, 367, (2007); *State ex rel. Sec'y of Soc. & Rehab. Servs. v. Clear*, 14 Kan. App. 2d 510, 511, (1990), *rev'd on other grounds*, 248 Kan. 109 (1991) (courts may *sua sponte* raise issues that are determinative of the case and issues that must be considered to prevent a denial of fundamental rights).

By contrast, a court may not *sua sponte* raise affirmative defenses such as the statute of limitations or qualified immunity. *Frontier Ditch Co.*, 237 Kan. at 864; *Huffmier v. Hamilton*, 30 Kan. App. 2d 1163, 1166, (2002). A court also may not *sua sponte* raise evidentiary issues such as admission of hearsay. *Carrasco*, 380 P.3d 721. In determining whether a court has abused its discretion in raising an issue *sua sponte*, the procedure used by the court must also be considered. Courts must provide a fair opportunity for parties to brief the issue and to present their positions before making a final determination. *Puckett*, 230 Kan. at 601. It would be improper for a court to raise an issue *sua sponte* and render a ruling without affording the parties an opportunity to brief and argue the issue. *See Adams*, 283 Kan. at 368.

Defendant Shawnee Mission School District filed a motion to dismiss in response to Plaintiffs' SB 40 petitions. At oral argument on the motion to dismiss, the district court *sua sponte* raised questions about whether the amendments made to KEMA by SB 40 were constitutional, and specifically whether the district court hearing procedure added to KEMA (SB 40's enforcement mechanism) denied government-defendants due

process and violated the separation of powers. Following oral argument on the District's motion to dismiss, the district court issued a Preliminary Order which, *inter alia*, explained in detail its concerns that "SB 40 presents significant constitutional problems" and invited the attorney general to intervene pursuant to K.S.A. 75-764(b)(2). R.O.A. Vol. 1 pp. 70-71. The district court withheld finalizing its order until the parties had an opportunity to "brief or address any arguments raised by the Court or through any intervention." R.O.A. Vol. 1 p. 71.

In its Final Order and Judgment, the district court dismissed the case "because SB 40 is unenforceable *and not only because the plaintiffs failed their burden of proof*." R.O.A. Vol. 2 p. 80 (emphasis supplied). The district court determined 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." R.O.A. Vol. 2 p. 92. The enforcement provisions of SB 40, specifically the right of an "aggrieved party" to bring an action in district court against a government entity, were the statutory authority by which Plaintiffs filed their petition. The enforceability of the enforcement mechanism was a jurisdictional issue that the district court had the authority and discretion to raise *sua sponte*.

Even if the enforceability of SB 40's enforcement mechanism was not a jurisdictional issue, the Court was entitled to *sua sponte* raise constitutional questions given the "exceptional circumstances" presented by SB 40. *See Puckett*, 230 Kan. at 600-01. The Attorney General characterizes the rule regarding courts' power to raise issues *sua sponte* too narrowly. Kansas courts' power to raise issues is not limited to

jurisdictional issues, but also extends to any issue that must be considered in order to serve the ends of justice or prevent the denial of fundamental rights. *Id.* Preservation of justice and fundamental rights were the precise goals of the district court when it exercised its power to raise issues *sua sponte*. In its Preliminary Order, the district court expressed concern that SB 40 "eliminate[s] due process in favor of the party that bears the burden of proof if an adjudication is tardy" and that "SB 40 eliminates the role of the judiciary ... in deciding its cases." R.O.A. Vol. 1 p. 70. Based on these concerns, the district court gave notice to the Attorney General in accordance with K.S.A. 75-764(b)(2). The statute anticipates that courts may *sua sponte* raise questions of the validity of statutes; it provides: "Before declaring or determining any statute ... invalid as violating the constitution ... or entering any judgment or order that determines or declares such invalidity, a district court or any judge of the district court, whether acting in judicial or administrative capacity, shall require ... that notice of the disputed validity has been served on the attorney general by the party disputing validity, or *by the court*." (emphasis supplied).

The district court acted within the scope of its discretion, and within its responsibility to uphold the Constitution, when it raised the issue of whether Plaintiffs were using an unenforceable statutory mechanism to sue the District. This is not a case where the district court improperly was "search[ing] for errors on behalf of litigants." *See Adams*, 283 Kan. at 368. The criteria for review of issues *sua sponte* were present - the constitutionality of SB 40's enforcement mechanism was a jurisdictional issue given the procedural posture of the case, analysis of the procedure used in SB 40's enforcement

mechanism through a constitutional lens was necessary in order to serve the ends of justice and to prevent denial of the fundamental right of due process, and all parties were given a full opportunity to present arguments and be heard on the issues raised by the district court. After receiving notice from the court in accordance with K.S.A. 75-764(b)(2), the Attorney General elected to intervene in the case and filed a brief defending SB 40's enforcement mechanism. The District, in turn, responded to the Attorney General's brief and argued that SB 40 violated its due process rights. The district court's action was not "arbitrary, fanciful, or unreasonable" in light of significant constitutional questions generated by SB 40.

II. The district court did not err in concluding that this case was not rendered moot by the expiration of the Governor's Declaration.

A. Standards of Review

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, (2020). Review by this court is unlimited. *Id.* at 590 (citations omitted). 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, (2002) The mootness doctrine is subject to exceptions, including one where the harm is capable of repetition or involves a question of public importance. *State v. DuMars*, 37 Kan.App.2d 600, 605, *rev. denied* 284 Kan. 948 (2007).

B. The Attorney General's proffered rationale for remanding this already dismissed case back to the district court only to be dismissed for lack of jurisdiction based on mootness (asserted to result from the ending of the Governor's Declaration) is flawed. Essentially, the argument that this case was moot prior to the judgment entered by the district court is that: (1) the current action is premised on Section 1 of SB 40; (2) Section 1 of SB 40 is dependent on the Governor's Declaration; (3) the Governor's Declaration expired on June 15, 2021; (4) as a result, Section 1 of SB 40, to include Subsection 1(d), is now completely expired legislation; and (5) no other Section of SB 40 could possibly apply to Defendant Shawnee Mission School District. Aplt. Brf. pp. 6-12. As noted by the district court, the Attorney General bore the burden to show mootness and failed to do so. R.O.A. Vol. 2 p. 70, *citing Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115–16 (10th Cir. 2010).

1. Section 1 of SB 40 is not completely expired legislation. The argument that Section 1 of SB 40 is completely expired legislation hinges on reading its language to limit both the application of "action[s] taken, order[s] issued or polic[ies] adopted by [a] board of education" pursuant to Section 1(a) and any challenges to such actions, orders or policies under Section 1(c) – (d) to the time period that the Governor's Declaration was in effect. This declared state of disaster emergency was in effect from March 12, 2020, to June 15, 2021.[2] The plain language of Section 1 does not clearly

[2] The LCC granted a final extension through June 15, 2021, at its meeting on May 28, 2021, which is available at https://www.youtube.com/watch?v=obsRPZuioo0&t=3s.

support such a reading nor would such a reading necessarily render a challenge to the constitutionality of SB 40 moot.

a. Section 1(c) & (d) have not, or at least at the time the district court entered its judgment were not, expired. Although Defendant Shawnee Mission School District generally agrees with the Attorney General that, at a minimum, Section 1(a) of SB 40 is now, in effect, expired legislation because "the" specifically referenced state of disaster emergency declared by the Governor on March 12, 2020, has now ended, there has been no judicial pronouncement so holding and the effect of the expiration of Section 1(a) is not clear. [3] Moreover, it does not automatically follow that

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[3] For example, SB 40 Section 1(a) is not a grant of authority by the legislature to the local board of education for a Kansas public school district as suggested in Aplt. Brf., pp. 6-7. Rather it is a limitation on the authority of other governmental entities to regulate what may take place on school property or during school activities. *See* SB 40 Section 1(a)(1) ("**only** the board of education" (emphasis added)); SB 40 Section 1(a)(3). The limitation upon which the Attorney General relies to declare Section 1 expired – "[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 thereto," – would appear to apply only to this restriction on the ability of any other governmental entities, ie. "the state board of education, the governor, the department of health and environment, a local health officer, a city health officer or any other state or local unit of government", to "take any action related to such disaster emergency that affects the operation of any school or attendance center of such school district." In other words, as opined by the Attorney General prior to the enactment of SB 40 Section 1, the local board of education for a Kansas public school district has the authority to, *inter alia*, require the wearing of masks on school property or during school activities. Kan. A.G. Op. No. 2020-008, pp. 9-13. This begs the question of whether any such action taken by a local board of education would need to be taken during the Governor's March 12, 2020, declared state of disaster emergency in order to be subject to the review provisions found in Section 1(c) & (d). Again, in this regard, Defendant Shawnee Mission School District reads the language of SB 40 Section 1 in the same manner as the Attorney General such that the review provisions found in Section 1(c) & (d) only apply to school board actions, orders or policies that were taken, issued or adopted during the Governor's March 12, 2020, declared state of disaster emergency.

all "action[s] taken, order[s] issued or polic[ies] adopted by [a] board of education" pursuant to Section 1(a) are no longer in effect or that the procedures provided by Section 1(c) – (d) are no longer available to an aggrieved party.[4]

b. Even if Section 1 of SB 40 is now permanently expired legislation, this does not necessarily mean that, as a result, Plaintiffs' pending claims against Defendant Shawnee Mission School District in this case are moot. Instead, such a judicial determination regarding Section 1 would, at most, only impact challenges to any "action taken, order issued or policy adopted by the board of education of a school district pursuant to subsection (a)(1)" – *ie*. that took place on or before June 15, 2021, -- which were not timely pursued as provided by Section 1(c) – (d) by an aggrieved party within 30 days of such occurrence or at the latest July 15, 2021. *See* SB 40 Section 1(c)(1). Challenges pursuant to Section 1(c) – (d) by an aggrieved party could arguably even continue to be made to "an action of any employee of a school district violating any such action, order or policy" even after July 15, 2021, so long as the "action, order or

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[4] For example, Section 1(c)(1) makes the review process available to "[a]n employee, a student or the parent of guardian of a student aggrieved by an action taken, order issued or policy adopted by the board of education of a school district pursuant to subsection (a)(1), **or** an action of any employee or a school district violating any such action, order or policy" (emphasis added). This use of the disjunctive "or" appears to lay out two circumstances under which a party might be aggrieved so as to be able to avail themselves of the review procedure determined by the district court to be unconstitutional. Only the first such circumstance would appear to be potentially dependent upon the Governor's March 12, 2020, declared state of disaster emergency still being in place. This is because "an action taken, order issued or policy adopted by the board of education pursuant to subsection (a)(1)" could continue after the expiration of the Governor's March 12, 2020, declaration and, therefore, a school district or its employee could still violate an action, order or policy previously adopted by the school board during the period the Governor's declaration had been in effect.

policy" was taken, issued or adopted by the board of education prior to June 15, 2021. See SB 40 Section 1(c)(1). In other words, the procedures provided for in Section 1(c) – (d) will continue to exist as the law of the State of Kansas (unless repealed or amended by the legislature or unless this Court affirms the district court's determination that SB 40, or at least Section 1(c) – (d) thereof, is unconstitutional). It is just that, at some point, there will presumably be no remaining actions, orders or policies still in effect that were taken, issued or adopted pursuant to Section (a)(1) – *ie.* during the Governor's Declaration -- such that there could be an aggrieved party with standing to proceed under the provisions of Section 1(c) – (d). While this might well foreclose certain future claims under Section 1(c) – (d), it does not render the claims of the Plaintiffs in this case moot and would truly be nothing more than an advisory opinion.

2. Even if Section 1 of SB 40 could now be considered expired legislation in its entirety, it was not at the time the district court entered its judgment. The Governor's March 12, 2020, declared state of disaster emergency was clearly still in effect when this civil action was filed on May 28, 2021, and when the district court issued its Preliminary Order on June 8, 2021. More fundamentally, the policy which formed the basis of Plaintiffs' legal challenge did not go away merely because the Governor's March 12, 2020, declared state of disaster emergency expired. Even when the district court issued its Judgment and Final Order, the 30-day time period for challenging an "action, order or policy" by a school board under Section 1(c) – (d) had not yet expired. So even if the Court concludes that Section 1 is now completely expired rendering this appeal moot, Section 1 had not expired and this action was not moot when judgement was

entered by the district court. No motion to reconsider was filed with the district court and, if this action is now moot, the proper recourse is not to reverse the district court which ruled at a time when the action was not moot. Instead, it would be to conclude that the action is now moot and dismiss this appeal.

3. Sections 8(e)(1) and 12(d)(1) has not expired. As predicted by the district court, SB 40 and its unconstitutional enforcement provisions did not go away merely because the Governor's Declaration expired and these enforcement provisions continue to impact and interfere with Defendant Shawnee Mission School District's ability to focus on providing a safe and stable learning environment for its students during this continuing COVID-19 pandemic. Unlike Section 1, the parties agree that Sections 8 and 12 are not dependent upon the Governor's Declaration being in effect. Instead, Section 8(e)(1) deals with a state of local disaster emergency declared by, *inter alia*, the chairperson of the board of county commissioners of any county. Significantly, on March 13, 2020, the Board of County Commissioners of Johnson County, Kansas, (the county in which Defendant Shawnee Mission School District is located) issued a state of local disaster emergency declaration which remains in effect. *See* https://www.jocogov.org/press-release/county-management/johnson-county-declares-state-emergency.

More recently, on August 5, 2021, the Board of County Commissioners of Johnson County, Kansas, sitting as the County Board of Health, issued Public Health Order No. 001-21, attached as Exhibit A to Appellee's Response to Motion for Stay Pending Appeal, effective August 9, 2021, through May 31, 2022, which orders

Defendant Shawnee Mission School District, as well as other public and private schools located in Johnson County, Kansas, to require individuals, including certain students, to use masks or other face coverings in certain school settings "[t]o ensure that schools may operate as safely as possible." The Johnson County Public Health Order provides that "[t]his Order shall apply to all public and private K-12 schools within Johnson County" and that "[t]he Board of Educations 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." This Public Health Order is premised on the state of local disaster emergency declaration issued by the Board of Commissioners of Johnson County, which remains in place. Based on this Public Health Order and in response to the issues and continuing concerns regarding the spread of COVID-19 as expressed in the Order, Defendant Shawnee Mission School District adopted a revised Mitigation Plan for the 2021-22 school year at a Special Board of Education meeting held on August 5, 2021 (attached as Exhibit B to Appellee's Response to Motion for Stay Pending Appeal).

As anticipated by the district court, some of the very provisions in SB 40, specifically Sections 8(e)(1) and 12(d)(1), determined to be unconstitutional that no one disputes remain in effect are being used to challenge actions that impact Defendant Shawnee Mission School District requiring it to spend time and resources defending its Mitigation Plan instead of providing safe educational opportunities for its students. Similar to what occurred in this case prior to the Memorial Day Holiday weekend, a civil action has been filed on September 3, 2021, seeking to challenge Public Health Order No.

001-21.[5] *M.M.C., by and through her next friend, B.C., v. The Board of County Commissioners of Jonson County, Kansas*, Tenth Judicial District of Kansas Case No. 21-CV-04112.[6] Although Defendant Shawnee Mission School District is not named as a party in that civil action, the district will be impacted by any ruling in that case and could easily be named in such a civil action based on the plain language of Section 8(e)(1) which states that an aggrieved party can challenge any "action taken by a local unit of government" and, of course, Defendant Shawnee Mission School District is not only a "local unit of government" but is charged under Public Health Order No. 001-21 with enforcement of the Order.

C. Consideration of whether SB 40 was constitutional was proper regardless of whether Plaintiffs' claims under Section 1 of SB 40 are moot. As recognized by the district court, mootness is a prudential consideration and, as such, allows "courts discretion, as a matter of policy, to address significant concerns that may arise again." R.O.A. Vol. 2 p. 74 *citing State v. Roat*, 311 Kan. 581, 587, (2020). The district court correctly recognized that even "if the unconstitutional pandemic provisions in §§ 1 and 2 expire," similar enforcement provisions to include those found in Sections 8(e)(1) and 12(d)(1) remain creating an exception to mootness. R.O.A. Vol. 2 p. 72 *citing Stano v. Pryor*, 52 Kan. App. 2d 679, 683, (2016). The district court went on to note:

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[5] Although expressly challenged under Section 12(d)(1), Public Health Order No. 001-21 would appear to be equally subject to potential challenge under Section 8(e)(1).

[6] A similar action filed against Morris County. *See Litke v. The Board of County Commissioners of Morris County, Kansas*, 8th Judicial District of Kansas Case No. MR-2021-CV-000013, filed September 3, 3021.

> 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.

R.O.A. Vol. 2 p. 73 *citing State v. DuMars*, 37 Kan.App.2d 600, 605, *rev. denied,* 284 Kan. 948 (2007); *see also*, *State v. Kinder*, 307 Kan. 237, 244, (2018). The range of collateral interests that may preserve an appeal is wide. *Roat, 594 citing State v. McCraw*, 551 S.W.2d 692 (Tenn. 1977). Given the volume of cases that have been, and continue to be, filed under SB 40 as public officials continue to try to address the on-going COVID-19 pandemic, it is difficult to imagine a case that falls more squarely in to both a situation where the harms are capable of repetition and involve questions of public importance. No err can be found in the district court's conclusion that the constitutionality of SB 40 was not moot. Nor is it moot now on appeal.

III. The district court did not err in concluding that it had jurisdiction to consider the constitutionality of SB 40.

A. Standard of Review.

Appellate courts review questions of subject matter jurisdiction using a *de novo* standard of review. *State v. Jackson*, 280 Kan. 16, 20, (2005), *cert. denied* 546 US 1184 (2006).

B. Defendant Shawnee Mission School District had standing before the district court and continues to have standing to challenge the constitutionality of SB 40.

Although a separate argument based upon lack of standing is made, this argument, as presented, appears to still be premised on mootness and not standing. Aplt. Brf. pp. 10-12. Mootness is generally defined as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22, (1997) (citations omitted). Nonetheless, the Attorney General relies on the recently decided case of *Baker v. Hayden*, ___ Kan. ___, 490 P.3d 1164, 1171 (2021), to support its argument that Defendant Shawnee Mission School District has somehow lost its standing to challenge the constitutionality of SB 40 and that, as a result, jurisdiction no longer exists.

However, the proceedings in *Baker* and the posture in which that case arrived in this Court differ substantially from the proceedings in and the posture of the present case. In *Baker*, the plaintiff had filed suit to obtain certain records under the Kansas Open Records Act. *Baker*, at p. 1167. During the discovery phase of his lawsuit, the plaintiff in *Baker* obtained through discovery the very records he sought. *Baker*, at p. 1168. As a result, the district court dismissed the plaintiff's claims based, *inter alia*, on its determination that his claims were moot. *Baker*, at p. 1168. The plaintiff in *Baker* as the non-prevailing party appealed and the Court of Appeals reversed (but did not remand) the district court's decision finding, *inter alia*, that plaintiff's claims were not moot because the "issue was capable of repetition and was of public importance." *Baker*, at p. 1168. The defendant in *Baker* then petitioned this Court for review, but, as noted by this Court, did not seek review of the Court of Appeals' ruling that "exceptions to the mootness

doctrine allowed consideration of the issues" upon which review was sought and the plaintiff did not cross-petition. *Baker*, at p. 1169. Against this backdrop, this Court then took up, as a jurisdictional issue, whether the plaintiff had lost standing because he had obtained the records he sought, an issue that up to that point in the litigation had been considered by both the Court of Appeals and the district court under the prudential doctrine of mootness. *Baker*, at p.1169.

Significantly, in *Baker*, this Court, upon concluding that standing no longer existed, did not vacate the judgment of the district court dismissing the case, but, instead, concluded that both the Supreme Court and the Court of Appeals lacked jurisdiction and then dismissed the appeal. *Baker*, at p. 1175. "Standing is a component of appellate courts' jurisdiction. When a party loses standing, courts lose jurisdiction. And without jurisdiction, we must dismiss the appeal." *Baker*, at p. 1167. Notably, the effect of this Court's ruling was to reinstate the judgment of the district court in its entirety. Accordingly, in the present case, if this Court accepts the Attorney General's argument that jurisdiction no longer exists, then the result should be dismissal of this appeal for lack of jurisdiction and not a reversal of the district court's decision which as discussed above was rendered during a time when Defendant Shawnee Mission School District clearly still had standing to challenge the constitutionality of SB 40.

Further, as the prevailing party before the district court, Defendant Shawnee Mission School District cannot lose standing on appeal merely because it prevailed below such that it cannot now defend the judgment rendered in its favor by the lower court. Finally, as discussed above, the argument that "[s]ince the school district is no longer

affected by Section 1 of SB 40, it no longer has standing to challenge it," Aplt. Brf. p. 11, is simply not supported factually or legally as Defendant Shawnee Mission School District continues to be affected and impacted by the unconstitutional provisions of SB 40.

IV. The district court correctly determined that SB 40 was not constitutional.

A. Standard of Review.

The constitutionality of a statute is a question of law that is reviewed de novo. *Tolen v. State*, 285 Kan. 672, 673, (2008). The constitutionality of a statute is presumed, and all doubts must be resolved in favor of the validity of the statute. *Id.* This Court has noted that it has a duty to "construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute." *Matter of Albright*, 17 Kan. App. 2d 135, 137, 836 P.2d 1, 2 (1992) (quoting *State v. Durrant*, 244 Kan. 522, 534, cert. denied 492 U.S. 923 (1989)). Courts declare a statute unconstitutional when it is "clear beyond a reasonable doubt" that a statute infringes on constitutionally protected rights. *State v. Cook*, 286 Kan. 766, 768, 187 P.3d 1283, 1286 (2008).

B. The enforcement mechanism in SB 40 is unconstitutional in that it violates government defendants' procedural due process rights.

The enforcement mechanism in SB 40 operates the same for all government entities subject to the law. *See* SB 40 Sec. 1(d); 2(d); 6(g); 8(e); 12(d). The law allows any "party aggrieved" by an order issued by the government entity related to the COVID-19 public health emergency to file a civil action in district court within 30 days after the

order is issued. The district court is required to conduct a hearing on the petition "within 72 hours after receipt of the petition" and to issue an order within 7 days. The law directs the court to grant the request for relief unless the defendant government entity has met a "narrowly tailored" standard of proof. In the event the district court, for any reason, does not issue an order within 7 days, then by default the relief requested in the petition is granted. The only limitation on the grant of relief is that any requested stay or injunction cannot apply beyond the county in which the action was taken.

Procedural due process is our "fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 589 (1972) (Marshall, J., dissenting). "The very purpose of procedural protection is the tempering of the decision process to help insure fairness, and fairness demands that competing interests be represented before the decision-maker on as equal a footing as circumstance permits." *Wertz v. S. Cloud Unified Sch. Dist. No. 334*, 218 Kan. 25, 32, (1975) (quoting *Wagner v. Little Rock School District*, 373 F.Supp. 876 (E.D. Ark. 1973). The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *In re Adoption of B.J.M.*, 42 Kan. App. 2d 77, 81 (2009). Due process is not a static concept; instead, its requirements vary to assure the basic fairness of each particular action according to its circumstances. *Kempke v. Kansas Dep't of Revenue*, 281 Kan. 770, 776 (2006), as corrected (May 18, 2006).

Multiple aspects of SB 40's enforcement mechanism deprive government defendants of procedural due process: the award of all relief requested to the plaintiff if

the court fails to render a decision within 7 days of the hearing (the "default provision"), use of a strict scrutiny standard when no fundamental rights of the plaintiff are at issue, the lack of any requirement for the plaintiff to show how they were aggrieved or harmed by the government defendant's order, the failure to limit or define the type of relief that may be awarded to the plaintiff or to allow the court any discretion in awarding relief, and the unreasonably short timeline for a government defendant to respond to a challenge. The district court aptly identified these problematic aspects of the enforcement mechanism in its Final Order:

> 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. 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.

R.O.A. Vol. 2 p. 83.

The law requires a default judgment against school districts if a district court (as opposed to the school district itself) defaults – if the court does not or cannot (due to full

dockets or any other reason) issue an order on a SB 40 petition within a 7-day time period. The legislature's apparent intent in imposing a short timeline on the judicial process is clear - to require hurried decision-making or to hand judgment to the plaintiff in the form of all relief they requested excluding only injunctive relief applied beyond the county. Neither hurried decision-making, nor default judgment against a party that has not defaulted, are indicative of a fair process.

Judges are rarely able to issue orders that are dispositive of a case within 7 days of a hearing (or within 10 days of a case being filed). Even setting aside the issue of full dockets and busy hearing schedules, time is needed to review evidence and authorities and to draft a decision. Given the potential complexity of a SB 40 petition, *see, e.g. Baker v. Blue Valley Sch. Dist. USD 229*, No. 21CV0221-HLT-TJJ, 2021 WL 2577468 (D. Kan. June 23, 2021), it is very likely that a court would need more than 7 days to weigh the challenges made and evidence presented in a SB 40 matter and to issue a final decision. In fact, judges have had difficulty meeting this unreasonable deadline. In *Baker*, Judge Teeter's order was issued on June 23, 2021, more than 7 days after the May 6th removal. *Id.* at *1. In the present case, the district court issued a Preliminary Order within 7 days of the June 2, 2021 hearing on Plaintiffs' petitions, but afforded the Plaintiffs more time to show "any action … that the District has taken that constitutes some current policy that impacts their children", and the district court's final order was not issued until 7 weeks after the petitions were filed. A board of education's policies about how to mitigate against the spread of COVID-19 in schools are critically important; the health of thousands of children and adults are determined by those plans and the

fidelity with which they are carried out. A legislative scheme which allows for either rushed judicial consideration or no judicial consideration of these important decisions by school districts and other governmental entities cannot be held constitutionally valid.

SB 40 requires the government defendant to prove that its order is "narrowly tailored to respond to the state of disaster emergency and uses the least restrictive means to achieve such purpose." If the defendant fails to meet this burden, then SB directs courts that they "shall grant the request for relief." This structure is borrowed from constitutional law and the strict scrutiny standard of review used to evaluate whether a law infringes on a fundamental constitutional right. Yet no fundamental right is at stake with a SB 40 action; there is no fundamental right impacted by a requirement to wear a cloth face covering in a public space or to engage in other hygienic measures that prevent the spread of a communicable disease. As noted by the district court: "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." R.O.A. Vol. 2 p. 83. There is no justification for use of a strict scrutiny standard in SB 40.[7] The legislature's apparent intent in applying the highest and most stringent standard of judicial review, while allowing only 7 days for such review to take place, was to establish a process that is highly favorable to the plaintiff and that makes it incredibly difficult and burdensome for a government defendant to defend its

[7] Of course, if an individual believed that a fundamental right or other constitutional right was somehow infringed by a government's order issued in response to the COVID-19 pandemic, the proper course of action would be to file suit for violation of their constitutional rights, wherein the court would apply the appropriate standard of review given the right at stake.

COVID-19 response plan. Facing a statutory scheme totally devoid of due process, and the possibility of an onslaught of challenges by any person who deemed themselves a "party aggrieved", some government entities opted to simply abandon their COVID-19 response plans.[8]

SB 40 also contains no requirement that a plaintiff plead allegations regarding their standing to challenge a governmental order made in response to COVID-19, or to show some individual harm. The plaintiff has no pleading requirement or burden of proof with respect to how they qualify as a "party aggrieved." Rather, SB 40 "shifts the burden onto the District to show otherwise." R.O.A. Vol. 2 p. 83. The law permits any employee, student, or parent/guardian of a school district to challenge the district's COVID-19 response plan simply because they disagree with it and feel that their judgment should be substituted for the local school board's judgment. The local rules adopted by the Johnson County District Court, which were an attempt to "fill in the procedures lacking in SB 40", R.O.A. Vol. 2 p. 86, identified the lack of any pleading standard or burden of proof on the plaintiff as a procedural deficiency in SB 40. The local rules, Local A.O. No. 21-01[9], require plaintiffs to "include factual allegations with specificity indicating how [they are] substantially burdened or inhibited by specific provision(s) of the order under consideration", and to "include all of the factual

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[8] *See* *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/* (listing local governments that "want[ed] to impose certain COVID-19 restrictions but … decided otherwise because of the new law").

[9] The district court's administrative order is available on its website: https://courts.jocogov.org/covid/AO-21-01.pdf

allegations necessary to support the elements for injunctive relief" in the petition. At a minimum, in order for a government defendant to be required to defend an action taken or order issued, the plaintiff must be required to identify how that action or order has harmed them or infringed on such right. But SB 40 contains no such requirement and unfairly assumes that a school district's COVID-19 response plan causes harm to students and/or employees of a school district. The irony of this assumption is profound.

SB 40 allows for the possibility of wildly inappropriate relief to the plaintiff, and uses this possibility as a scare tactic against government entities attempting to keep Kansas citizens safe during an unprecedented global pandemic by following the recommendations of public health authorities and medical experts.[10] The law contains no limitation on the type of relief that may be requested by or awarded to a plaintiff. It also contains no requirement that the plaintiff support its request for relief and removes the ability of the district court to evaluate the plaintiff's entitlement to the requested relief. The law *mandates* that a district grant the relief requested if it finds that the government defendant has failed to show, with a 72-hour preparation time, that its order is "narrowly tailored" and uses the least restrictive means. By default, it awards the relief requested to the plaintiff in the event the court does not enter an order within 7 days. In denying government defendants the ability to challenge the nature or scope of the requested relief, and disallowing any judicial consideration or evaluation of the relief in the event that the government defendant has failed to meet its standard or in the event that

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[10] *See* https://sentinelksmo.org/school-boards-ignore-legislative-intent-on-sb-40-hearings/ ("[Sen. Kellie] Warren said a goal of SB 40 is "to bring the political pressure to bear on the officials before they make these orders….")

judgment is entered against the government defendant by default, SB 40 places a level of pressure on school districts and other governmental entities that belies due process.

Finally, the abbreviated process and short timelines in Section 1(d) do not provide government defendants with a "meaningful" opportunity to defend themselves against challenges to their reopening plans. The law affords only 72 hours for a school district to prepare its presentation of evidence. A three-day time period, regardless of how the time is calculated, is wholly insufficient for a school district to prepare for a full evidentiary hearing on a challenge that could contest multiple or all components of a multi-faceted COVID-19 response plan. Depending on the nature of the challenge, a school district may need to prepare numerous exhibits showing its process for development of response plans and the authority and guidance upon which it relied in developing and approving response plans, identifying and preparing witnesses to include school district employee and medical experts, and researching and preparing legal and substantive arguments. The short response time allows for a plaintiff to use gamesmanship to further limit a government defendants' opportunity to defend its COVID-19 response. By way of example, the Plaintiffs here filed their petitions on the Friday before Memorial Day. By way of further example, the plaintiffs in the recently-filed cases against the Johnson and Morris County Board of Commissioners filed their petitions on the Friday before Labor Day. A fundamental requirement of procedural due process is the opportunity for hearing appropriate to the nature of the case and sufficient time to prepare a defense given the possible consequences of the hearing. SB 40 fails to meet this requirement.

The consequence to a school district that does not prevail in a SB 40 lawsuit is that its constitutional right to operate its schools through its locally elected boards, Art. 6, § 5 Kan. Const., is supplanted and its COVID-19 response plan or some component thereof is judicially voided. Further, given that the relief that may be requested by a plaintiff is not limited in any manner, a school district could also face a judgment that includes other injunctive relief and/or a monetary award. Before consequences of this nature are imposed, a school district is entitled to a procedure that gives it a fair chance to defend its COVID-19 response plan, that appropriately balances the burden of proof on the respective parties and utilizes an appropriate standard of review so that the cards are not stacked against the district, and that allows for judicial consideration of both the district's response plan and any relief requested by the plaintiff.

C. The enforcement mechanism in SB 40 is unconstitutional in that it violates the separation of powers.

The basic meaning of the separation of powers doctrine is that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments. *State v. Ponce*, 258 Kan. 708, 711, (1995). The doctrine was designed to "allow the respective powers to be assigned to the department most fitted to exercise them." *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 287, (1976) The doctrine is violated when legislation permits one branch of government to usurp or intrude into the powers of another branch of government. If such a situation exists, the statute is unconstitutional. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 880, (2008).

The district court's Final Order succinctly explains how SB 40 violates the separation of powers:

> It seeks to speed up or ignore judicial discretion or even decisions. … 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.

R.O.A. Vol. 2 p. 91. The district court's analysis primarily was based on *State v. Buser*, 302 Kan. 1, 2015 WL 4646663 (2015), where a statute that imposed mandatory deadlines for courts to issue decisions was held to be invalid for violating the separation of powers.

The factors set forth by this Court in *Miller v. Johnson* are used to determine whether a significant interference by one branch of the government into the operations of another branch has occurred: "(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. 636, 671 (2012). In applying these factors to SB 40, the district court correctly concluded that the law violates the separation of powers.

By dictating when a district court must render its decision on a suit brought pursuant to SB 40, the legislature attempted to exercise a power that belongs to the judiciary in violation of the first *Miller* factor. The Kansas judiciary's power is the "power to hear, consider and determine controversies between rival litigants." *Buser* at *7 (citing *Sebelius*, 285 Kan. at 895). Accordingly, the power in Kansas to set decision-making time limits "clearly belongs to the state Supreme Court." *Id.* With regard to the second *Miller* factor, the degree of control that the legislature attempted to exert over the

judiciary through SB 40 is substantial. SB 40 imposes an arbitrary deadline for judicial decision-making and dictates the outcome of cases through "shall' clauses directed at district courts. Further, SB 40 "repeals … by implication" procedural rules by which the courts operate. *See* R.O.A. Vol. 2 pp. 88-89 (explaining how SB 40 violates Kansas Supreme Court rules and K.S.A. 60-255 regarding default judgment).

The clear objective of the legislature in crafting SB 40's enforcement mechanism was to use the judicial system as a sword against governmental entities that issue orders or make policies in response to COVID-19. The enforcement mechanism does not allow for meaningful judicial review of even simple mitigation efforts, much less multi-faceted mitigation plans or complex challenges to such plans. Rather, the goal of the enforcement mechanism is to weaponize the court system and use it as a tool to invalidate governmental responses to the COVID-19 pandemic. Any objective to manipulate the court system indicates a violation of the separation of powers under the third *Miller* factor. The fourth *Miller* factor, the practical result of blending powers as shown by actual experience, can be analyzed by the turmoil that has ensued in the wake of SB 40. The vagueness and procedural gaps in the law, along with the law's conflict with typical civil procedure, has caused confusion amongst litigants and the courts about SB 40's validity, application, and operation.[11]

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[11] For example, there has been confusion about who can bring a SB 40 challenge, the type of government action that may be challenged under SB 40, and whether SB 40 may be used to challenge orders issues or policies adopted by school districts prior to the effective date of SB 40. These issues were litigated before Judge Wonnell of the District Court of Johnson County, Kansas in a lawsuit filed by Johnson County Commissioner

While a careful walk through of the *Miller* factors informs a violation of powers analysis, it is hardly necessary to reach the conclusion that SB 40 represents an impermissible encroachment by the legislature on the powers of the judiciary. This Court determined in *Buser* that the legislature may not impose deadlines on state court decisions, and SB 40 is in direct violation of that holding. Further, any attempt by the legislature to allow for a default judgment without judicial input, or with minimal time for judicial input, so clearly encroaches on the power and responsibility of the judiciary that it must be invalidated.

V. The district court did not err by not severing certain portions of SB 40.

A. Standard of Review.

Whether a statute is severable is a question of law, so this Court's review is *de novo*. *Cf. State v. Johnson*, 313 Kan. 339, 341, (2021).

Charlotte O'Hara against the Blue Valley School District. In that case, Commissioner O'Hara alleged that the Blue Valley School District violated SB 40 when it denied her entry to a SB 40 hearing held by the Board pursuant to Sec. 1(c) because she refused to wear a mask as required by the District's COVID-19 response plan on the basis that she had a medical exemption from wearing a cloth mask. Judge Wonnell determined that Commissioner O'Hara did not have standing to bring a SB 40 action because she was not a student, parent, or employee of Blue Valley School District, and that "other laws, but not … SB 40" could be used to pursue her claims. He further determined: "Since SB40 does not expressly reflect a legislative intent that it be applied retroactively, and since it effects a substantive change in the law, it may not be applied retroactively." *Charlotte I. O'Hara v. Blue Valley School District and Blue Valley School District Board of Education*, Case No. 21CV01464, Journey Entry dated April 28, 2021, Hon. Robert J. Wonnell, R.O.A. Vol. 1 pp. 4-48.

B. The issue of whether certain portions of SB 40 could be severed was not adequately raised below.

The district court concluded that although "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", "the enforcement provisions *are* the Act" and "are integral to the entire legislative scheme" such that the entire Act should be declared unconstitutional. R.O.A. Vol. 2 pp. 92-93. The district court and the Attorney General disagree on whether and to what extent severability was addressed below. *See* R.O.A. Vol. 2 p. 92; R.O.A. Vol. 1 pp. 77-78; Aplt. Brf. 21. The consequence of failing to raise an argument before a lower court is that the issue may not be raised on appeal. *Carter Petroleum Prod., Inc. v. Bhd. Bank & Tr. Co.*, 33 Kan. App. 2d 62, 70, (2004). The record reflects what transpired. *See* R.O.A. Vol. 1 p. 70; R.O.A. Vol. 2 pp. 32-38; R.O.A. Vol. 2 pp. 92-93; R.O.A. Vol. 2 pp. 95-96; R.O.A. Vol. 1 p. 76; R.O.A. Vol. 1 pp. 77-78. For purposes of this appeal, Defendant Shawnee Mission School District takes no position on whether the provisions specifically referenced in Aplt. Brf. pp. 23-24, (Sections 3(a), 4(b)(3), 4(b)(4), 6(b) and 6(d)) should be severed.

CONCLUSION

The Judgment and Final Order After Intervention by the Kansas Attorney General on July 15, 2021, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 9th day of September, 2021, the above and foregoing was electronically filed with the Clerk of the court using the Court's electronic filing system and a served upon the following by e-mail:

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