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

CORRECTED *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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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: October 5, 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 5th day of October 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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