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 BLUE VALLEY UNIFIED SCHOOL DISTRICT NO. 229

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

W. Joseph Hatley, KS #12929
Stephanie Lovett-Bowman, KS #24842
Angus Dwyer, KS #26995
1000 Walnut, Suite 1400
Kansas City, MO 64106
Telephone: (816) 474-8100
Fax: (816) 474-3216
jhatley@spencerfane.com
slovettbowman@spencerfane.com
adwyer@spencerfane.com

Melissa D. Hillman, KS #19180
Blue Valley U.S.D. 229
Chief Legal Counsel
15020 Metcalf Ave.
Overland Park, KS 66223
Phone: (913) 239-4000
mhillman@bluevalleyk12.org

Attorneys for *Amicus* Blue Valley Unified
School District No. 229

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

SB 40 upended Blue Valley's operations in April and May of 2021, capping the most difficult year in public education this century with an onslaught of legal actions targeting Blue Valley's face mask requirement. Like other Kansas school districts, Blue Valley was forced to defend its mask requirement against duplicative assaults by parents and various community members who were long on frustration but short on viable alternatives. SB 40's fire-drill timelines, along with its "death penalty" default judgment provision entitling plaintiffs to receive all requested relief—regardless of the appropriateness of that relief—if Blue Valley failed to satisfy SB 40's demanding strict scrutiny standard, left Blue Valley little opportunity to catch its breath and directly challenge this profoundly unfair and unconstitutional law, let alone deliver the exemplary education to students that Blue Valley is historically known for.

Blue Valley U.S.D. 229's lived experience with SB 40 illuminates the reasons the district court identified for its conclusion that SB 40 is unconstitutional. While all parties agree Section 1 of SB 40, the section applicable to public school districts, has expired and is thus no longer effective, the practical and political forces at work behind SB 40 counsel this Court to review the merits of Judge Hauber's ruling and affirm his judgment that SB 40 is unconstitutional.

ARGUMENT

I. Blue Valley's Experience with SB 40

In August 2020, based on decisive national and local public health guidance, Blue Valley adopted a face mask requirement for all staff and students to mitigate against the spread of COVID-19. Blue Valley's mask rule included a medical exemption for individuals who provided appropriate documentation, as well as a disability exemption for students whose disabilities were incompatible with mask wearing. Blue Valley's mask requirement had its detractors, but the

requirement allowed Blue Valley to maximize the portion of its student population it was able to educate *in person* during the difficult 2020-21 school year.[1]

Gov. Laura Kelly signed SB 40 on March 24, 2021, thanks to mounting pressure on the state Legislature from Kansans fatigued by school closures, hybrid schedules, and face masks. SB 40 not-so subtly discouraged school districts from imposing COVID mitigation measures by flipping the power to the public to challenge those measures with unprecedented procedural rights. The law gave students, parents, and staff the right to submit grievances that had to be heard within 72 hours by the defending school district, and again under the same timeframe in district court should the school district deny a grievance. The law also imposed a new "strict scrutiny" standard, dramatically raising the bar school districts had to meet while they simply tried to follow the often-changing public health guidance to protect student, staff, and community health. Rather than allowing school districts time to adjust to the new regime or to efficiently plan for SB 40 grievances, SB 40 went into effect immediately.

---

[1] The importance of in-person education is being illustrated by emerging data about the adverse effects of long-term remote learning, particularly for younger students. One study based on data from the Netherlands showed students there learned essentially nothing during eight weeks of remote instruction forced by the pandemic. Engzell, Frey, Verhagen (2021), "Learning loss due to school closures during the COVID-19 pandemic," Proceedings of the National Academy of Sciences of the United States, https://bit.ly/3DXWKNH (last accessed September 8, 2021).

The Tennessee Department of Education just released the results of statewide achievement tests taken by students in that state last spring. Virtually across the board, significant percentages of students fell behind grade level, and economically disadvantaged students saw even greater drops. Mangrum, Meghan. "Tennessee Student Performance Plunged During the Pandemic; Under 30% of Students on Grade Level in Key Areas." *Tennessean.com*, Nashville Tennessean, August 2, 2021, https://bit.ly/3E04XBe (last accessed September 8, 2021). So doing whatever is necessary to preserve in-person instruction has become of paramount importance for school districts; distracting administrators with serial high-stakes hearings takes away from the time they should be spending on helping students recoup pandemic-induced academic losses.

From March 25 to the end of the school year on May 28, 2021, Blue Valley received nine SB 40 grievances and defended three separate SB 40 lawsuits.

- Blue Valley held five hearings in front of outside hearing officers to consider the various SB 40 grievances, because it was not feasible to convene the entire Board of Education quickly enough to meet SB 40's 72-hour hearing requirement. (Some hearings involved multiple grievances.) Blue Valley paid these outside hearing officers almost $11,000 to comply with Blue Valley's obligation to adjudicate each grievance.
- These hearings consumed an estimated 190 hours of administrative and staff time to coordinate, prepare for, and facilitate. The District's Superintendent, Assistant Superintendent for Special Education, General Counsel, and Head Nurse were particularly heavily involved. Each hearing required extensive logistical coordination, and the presentation of evidence—typically involving live witnesses (including medical professionals not employed by the District) whose attendance Blue Valley had to secure at the last minute.
- Of the nine grievances Blue Valley received, all of them essentially boiled down to demands for individual student mask exemptions, rather than wholesale challenges to an "action taken, order issued or policy adopted *by the board of education*." *See* SB 40, Section 1(c)(1) (emphasis added). As noted above, Blue Valley had in place an administrative process for individual mask exemption requests based on medical or disability-based needs. Remarkably, several of the grievants had sought and *received* exemptions for their children but still considered themselves "aggrieved." Perhaps more remarkable still, at least one parent grievant, Terri Baker, never

sought a medical or disability-based exemption for her son and instead went straight to the Board under SB 40.[2]

- The Board of Education members spent hours watching the recorded SB 40 hearings. The Board then held four special meetings to consider the hearing officers' recommendations after the various hearings and to render determinations on each grievance. Each time, the Board rejected the grievances.
- One community member, Charlotte O'Hara, skipped the SB 40 grievance process entirely, but on April 7, 2021, she nevertheless filed an SB 40 lawsuit. Ms. O'Hara was not an employee, parent, or student of Blue Valley—rather, she is a Johnson County Commissioner who purportedly has a grandchild who attends Blue Valley. The district court dismissed her lawsuit—but not before the court held a hearing within the 72 hours required, at which the court concluded O'Hara was not a proper plaintiff because she lacked standing under SB 40.
- On May 3, 2021, five grievants (the "Baker plaintiffs") filed an SB 40 lawsuit in Johnson County District Court. That suit also asserted SB 40 claims against Olathe School District, along with several other state law and federal claims against other defendants. Before a hearing was held in the district court, the suit was removed to federal court. After the Baker plaintiffs dropped their federal claims, the case was remanded to Johnson County District Court, where it remains pending. To date, the district court has not held the hearing that SB40 required to be held within 72 hours on the core SB 40 issue—Blue Valley's mask requirement in May 2021—because

[2] Ms. Baker only enrolled her son in Blue Valley for the 2020-2021 school year after SB 40 gave her license to demand board hearings if her child was a Blue Valley student.

the case is now entangled in a request by the Baker plaintiffs for a change of judge. Although Section 1 of SB 40 expired on June 15, 2021, the Baker plaintiffs have argued that SB 40 is self-executing and the district court's failure to hold a hearing on Blue Valley's mask requirement mandates a judgment in their favor, regardless of the merit (or lack thereof) of their SB 40 claims, let alone the appropriateness of their requested relief.

- Finally, when COVID cases dropped significantly in late May 2021 and Blue Valley announced its mask requirement had expired, grievant Terri Baker filed a second SB 40 lawsuit. This time she argued Blue Valley's administrative announcement that merely encouraged continued mask wearing for unvaccinated individuals was a "policy" that could be challenged under SB 40. Blue Valley scrambled to file a motion to dismiss before the district court held the required hearing within 72 hours. At the hearing, Ms. Baker's legal counsel argued that Blue Valley lacked a right to file a motion to dismiss under SB 40. But since a motion to dismiss was filed, Ms. Baker's counsel argued the court was required to allow the plaintiff to respond to Blue Valley's motion to dismiss within the typical time allowed under civil rules—even while recognizing that SB 40's 7-day decision clock was running and the motion would not be ripe until well after that deadline. The district court rejected that argument and dismissed Ms. Baker's SB 40 claims in an oral order.

In sum, Blue Valley found itself marshalling staff resources and paying hearing officers and legal counsel to participate in mini trials repeatedly in a matter of two months to defend its approach to protecting students and staff from COVID-19. Several of these grievances and two of

the lawsuits were not even proper SB 40 matters, but had to be treated as though they were to avoid running afoul of SB 40's default judgment provision. Blue Valley estimates its staff have spent almost 200 employee hours on these fire drills, time that came directly at the expense of these employees' obligation to further Blue Valley's educational mission. Thus, the rosy picture of the functioning of SB 40 presented by both the Attorney General (*see* AG Brief at 19-20) and by amicus Kansas Justice Institute is belied by the actual lived experience of school districts operating under it.

Far from operating as an efficient way to adjudicate the lawfulness of the district's remedial measures, it has served to bog Blue Valley down in serial hearings and multiple lawsuits with different parties over the lawfulness of the same measure. The reality is, SB 40 only increases efficiency in cases where the school district *loses* the first suit. Where a school district successfully defends its policy in one SB 40 action it cannot bank that victory and—as Blue Valley's experience shows—must instead continue to defend the same policy, again and again, against a succession of objectors, each "aggrieved" by the same policy.

Part of why this has occurred is that SB 40 has been routinely abused. Parents have used the statute not as it was apparently intended—as a mechanism for challenging the overall narrow tailoring of COVID-mitigation rules at a policy level—but rather as a vehicle to demand individualized exemptions from the rule for their own children. But with plaintiffs invoking SB40, both the school district and the courts have felt compelled to abide by its strict deadlines, even in cases where they concluded it did not apply.

Moreover, the impact of SB 40 overriding some of the ordinary rules of civil procedure has not been limited merely to claims asserted under SB 40 itself. Some plaintiffs have filed petitions asserting both SB 40 claims and non-SB 40 claims (including federal constitutional claims) in a

single suit, and have argued that the fast-tracked procedural requirements of SB 40 govern all their claims. Specifically, the Baker plaintiffs argued Blue Valley was not entitled to file a motion to dismiss, that Blue Valley was obligated to file an answer as to all claims (even non-SB 40 claims) within 72 hours, and that these propositions were still applicable even after the case had been removed to federal court on the basis of federal question jurisdiction due to the constitutional claims.

Whether or not it was the Legislature's intent, SB 40 unleashed this mess. The threat to the constitutionally protected ability of Blue Valley and other school districts to manage their own affairs is not an abstraction. For Blue Valley, it has been painfully real. SB 40 is a cudgel designed to bully school districts into declining to take reasonable safety precautions during an ongoing global pandemic by subjecting schools that take such precautions to an unending gauntlet of baseless challenges. It is an attempt at imposing a *de facto* Texas- or Florida-style mask ban without requiring the Legislature to take responsibility for imposing such a ban. The Kansas Constitution does not allow this madness, and this Court should not be under any illusions about what SB 40 looks like in practice as it considers this case.

II. The question of whether SB 40 is constitutional is not moot.

As this Court held just last year, mootness is not jurisdictional under Kansas law. *See State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020) ("Both the history of the mootness doctrine in Kansas, with the law developing on a prudential basis independent of federal analysis, and the problem of exceptions to the jurisdictional basis that inheres in the federal constitutional reasoning, lead us to conclude that the better approach is to consider mootness a prudential doctrine."). Because mootness is prudential rather than jurisdictional, it is subject to exceptions, one of which

applies in "cases that are otherwise moot but that raise issues that are capable of repetition and present concerns of public importance." *Id.* This case falls squarely within that exception.

The issue of whether the SB 40 framework is constitutional is manifestly capable of repetition. The COVID-19 pandemic is very much still ongoing.[3] If anything, the emergence of the more-transmissible Delta variant, and with it increased rates of infection among school-aged children, has only amplified the urgency of giving school districts the authority to take appropriate precautionary measures. The sociological forces driving anti-mask sentiment (as well as opposition to various other mitigation precautions) are likewise unabated and appear to be getting more intense.[4] Thus, while SB 40 *qua* SB 40 is no longer operative,[5] there is every reason to believe that the statute will be revived, or that some substantially identical new law will be passed, once the Legislature reconvenes in January 2022. Moreover, the underlying question is one of profound public importance. It was entirely appropriate for Judge Hauber to consider this issue on the merits and to rule on that basis, and it is appropriate for this Court to do the same.

---

[3] As a telling example, the Tenth Judicial District Court, from which this appeal is taken, cancelled all trials for September because of the high COVID transmission and hospitalization rates in Johnson County.

[4] School board meetings relating to mask mandates have recently become violent on numerous occasions. *See* https://www.axios.com/mask-school-mandate-violence-covid-3abff916-242d-4db5-87f7-b4314dc57c3d.html.

[5] It should be noted, of course, that notwithstanding the end of the state of emergency (and with it the right to bring SB 40 challenges under Section 1), Blue Valley is nevertheless still actively embroiled in SB 40 litigation with the Baker plaintiffs where resolution of the underlying SB 40 challenge was delayed by a brief sojourn in federal court that resulted from the plaintiffs' initial attempt to join federal constitutional claims to their SB 40 claims. Thus, for Blue Valley, SB 40 is very much a live issue despite SB 40's expiration.

III. SB 40 is unconstitutional whether or not school districts have due process rights, because it violates the separation of powers doctrine and strips school districts of their constitutionally protected right to operate their schools.

As Shawnee Mission ably argued below, the contention that school districts do not have any due process rights is without merit. However, even assuming *arguendo* the Attorney General's position on this issue is correct, it does not actually cure the constitutional defects in SB 40. The core problem with SB 40 is not that its procedural mechanisms—hyper-accelerated timelines, heavy-handed burden shifting, and award of standing to parties who at least potentially lack injury in fact—violate school districts' due process rights. Rather, the core constitutional defect is that the procedural chicanery, and the genuine due process problems that flow from it, violates structural provisions of the Kansas Constitution—specifically, the right of the judicial branch to control the functioning of judicial processes and the constitutionally protected right of school districts to govern the public schools within their charge.

Article 3, Section 1 of the Kansas Constitution vests "[t]he judicial power" of the state in the courts and gives this Court "general administrative authority over all courts in this state." This provision is part of the overall scheme of separation of powers in the state, which mirrors the federal equivalent. *See State v. Buser*, 302 Kan. 1, 1, 2015 WL 4646663 (2015). As this Court has held, one of the consequences of vesting the judicial power in this Court (and in the courts more broadly) is the courts have a right to be free from undue interference by the legislature in the administration of litigation. *Id.* at 6. This specifically includes a right to be free from efforts to force expedited adjudication via the statutory imposition of mandatory deadlines—including, crucially, mandatory deadlines that were substantially less expedited and less onerous than the 72-hour and seven-day deadlines imposed by SB 40. *See id.* at 13-14 (180-day decisional deadline unconstitutional as violative of separation of powers).

The Attorney General's effort to distinguish *Buser* is unavailing. The Attorney General appears to contend that SB 40 does not impose a deadline at all, since it allows courts to not issue an order within seven days and merely predetermines which party wins if that occurs. This position is patently absurd. A rule stating "decide this issue by X date or we will decide for you" facially imposes a deadline of X date. If anything, the invasion of the judicial prerogative is even more pronounced under SB 40, since it purports to usurp the courts' power to render final judgments in the event that the seven-day deadline is missed. Moreover, SB 40 also violated the separation of powers in other ways, such as by potentially requiring the issuance of advisory opinions, since it allowed suits by "aggrieved" persons without regard to whether they have suffered an injury in fact that would confer standing. *See State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 912, 179 P.3d 366 (2008). SB 40 is thus unconstitutional.

As this Court has long recognized, "an unconstitutional law is a nullity." *In re Jarvis*, 66 Kan. 329, 329, 71 P. 576 (1903). The courts have not only a valid interest to protect in refusing to enforce SB 40, but also have an independent constitutional duty not to enforce an unconstitutional law. *See Matter of Adoption of Baby Girl G.*, 311 Kan. 798, 808, 466 P.3d 1207 (2020) ("When it is necessary in order to determine the merits of the action or where the issues cannot be intelligently decided without doing so, the constitutionality of a statute should be decided, even if the parties failed to raise the constitutional question, failed to plead the question, or failed to present the question to the trial court."), quoting *State v. Sedillos*, 279 Kan. 777, 785, 112 P.3d 854 (2005); *Montoy v. State*, 279 Kan. 817, 826, 112 P.3d 923 (2005) ("[T]he judiciary's sworn duty includes judicial review of legislation for constitutional infirmity."). Judge Hauber's ruling was entirely appropriate under the circumstances.

Likewise, the Kansas Constitution guarantees local control over public schools by school districts themselves. *See* KAN. CONST. Art. 6 §5 ("Local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards."). As Judge Hauber noted in his order, this Court has repeatedly held both that a state law that "unduly interferes with or hamstrings the local school board in performing its constitutional duty to maintain, develop, and operate the local public school system" violates Article 6, Section 5 and that such violations are capable of being redressed by the courts. *Gannon v. State*, 298 Kan. 1107, 1128, 319 P.3d 1196 (2014); *Unified School Dist. No. 229 v. State*, 256 Kan. 232, 253, 885 P.2d 1170 (1994); *Unified School Dist. No. 380 v. McMillen*, 252 Kan. 451, 464, 845 P.2d 676 (1993). Moreover, this Court has, on multiple occasions, expressly held that school districts' status as political subdivisions of the state does not bar them from challenging violations of Article 6, Section 5 in court. *See Bd. of Educ. Of Unified School Dist. No. 443, Ford City v. Kansas State Bd. of Educ.*, 266 Kan. 75, 83, 966 P.2d 67 (1998); *McMillen*, 252 Kan. at 455-56, 845 P.2d 676.

As discussed at length in Section I, SB 40 has interfered with Blue Valley's ability to set COVID mitigation policy by establishing a strict scrutiny standard and procedural gauntlet not applicable to other Blue Valley operational policies. This more than amply satisfies the *Gannon* standard for establishing a violation of Article 6, Section 5. The fact that the Legislature chose to undertake that violation via a mechanism that is arguably also a due process violation does not insulate the underlying violation from a challenge, even assuming *arguendo* that school districts lack due process rights. Indeed, that is the core holding of *Gannon*: conduct by the state can constitute a violation of Article 6, Section 5 that the courts can redress even where the school

district cannot challenge the same conduct under the Fourteenth Amendment because of the political subdivision rule.

IV. If the Court declines to adjudicate the merits due to mootness, it should do so with an express statement that, because the state of emergency has ended, SB 40 is no longer in effect and all pending SB 40 claims are moot.

As discussed above, Blue Valley is still subject to a pending SB 40 suit in which the plaintiffs have sought not just injunctive and declaratory relief but also damages with respect to their SB 40 claim. The question of whether SB 40 claims may still be brought is thus very much not an academic one for Blue Valley. While Blue Valley believes the question of SB 40's constitutionality is not moot for the reasons set forth above, it respectfully requests that, if the Court disagrees and declines to adjudicate the merits on the grounds of mootness, it make clear in the resulting opinion that it is doing so because the state of emergency has ended, Section 1 of SB 40 is no longer in effect and, in consequence, any pending SB 40 claims are moot because they seek procedural rights and relief that is no longer available under the law. Doing so will substantially streamline the related pending litigation and reduce the likelihood the exact same questions will need to be re-litigated anew in the near future in an appeal from that action.

CONCLUSION

Blue Valley asks the Court to proceed to the merits of the district court's order and affirm the district court's holding that SB 40 is unconstitutional.

Respectfully Submitted,

SPENCER FANE LLP

/s/ Stephanie Lovett-Bowman

W. Joseph Hatley KS #12929
Stephanie Lovett-Bowman KS #24842
Angus Dwyer KS #26995
1000 Walnut, Suite 1400
Kansas City, MO 64106
Telephone: (816) 474-8100
Fax: (816) 474-3216
jhatley@spencerfane.com
slovettbowman@spencerfane.com
adwyer@spencerfane.com

Melissa D. Hillman, KS # 19180
Blue Valley U.S.D. 229
Chief Legal Counsel
15020 Metcalf Ave.
Overland Park, KS 66223
Phone: (913) 239-4000
mhillman@bluevalleyk12.org

Attorneys for *Amicus*
Blue Valley Unified School District No. 229

CERTIFICATE OF SERVICE

I certify that on September 13, 2021, the foregoing was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to:

Kristin Butler
6951 Hallet Street
Shawnee, KS 66216
kristinmariebutler@gmail.com
Pro Se Plaintiff

Scott Bozarth
6319 Antioch Road
Merriam, KS 66202
Scott.bozarth@yahoo.com
Pro Se Plaintiff

Gregory P. Goheen
McAnany, Van Cleave & Phillips, P.A.
10 E. Cambridge Circle Drive, Suite 300
Kansas City, Kansas 66103
ggoheen@mvplaw.com

Rachel B. England
General Counsel
Shawnee Mission School District
U.S.D. No. 512
rachelengland@smsd.org
Attorneys for Defendant-Appellee Shawnee Mission School District Board of Education

Brant M. Laue, Solicitor General
Office of Attorney General Derek Schmidt
Memorial Hall, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612
ksagappealsoffice@ag.ks.gov
brant.laue@ag.ks.gov
Attorneys for Appellant

Samuel G. MacRoberts
Kansas Justice Institute
12980 Metcalf Avenue, Suite 130
Overland Park, Kansas 66213
Sam.macroberts@kansasjusticeinstitute.org
Attorney for Amicus Curiae Kansas Justice Institute

Miriam E. C. Bailey
900 West 48th Place, Suite 900
Kansas City, MO 64112
mbailey@polsinelli.com
Attorney for Amicus Curiae Kansas Chamber of Commerce

/s/ Stephanie Lovett-Bowman
An attorney for *Amicus*
Blue Valley Unified School District No. 229