



To: Senator Jeff King, Chairman
Members of the Senate Judiciary Committee

From: Callie Jill Denton JD
Executive Director

Date: June 23, 2016

RE: Potential senate concurrent resolution that would prohibit the legislature and the courts from closing schools as a result of school finance litigation (SCR No. ___)

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial attorneys. KsAJ has no public policy position on school finance. KsAJ has reviewed draft resolutions circulated during the joint meeting of the House and Senate Judiciary Committees on June 16-17, 2016 (16rs4395 and 16rs4396). Our comments are based on those drafts; we have focused on 16rs4395 which eliminates the authority of the court to order a school district to be closed or to make an order, the effect of which is to prohibit the expenditure of funds such that a district will not operate. The amendment also eliminates the authority of the legislature to act when its action is in direct response to a court ruling which would be a violation of the amendment.

KsAJ believes that the amendment has implications beyond prohibiting the legislature and the courts from closing schools. The amendment corrodes judicial review and the functions of the branches of government as co-equal; it consolidates power in the executive branch and eliminates the right of citizens to seek the courts' constitutional review. KsAJ opposes the amendment, and cannot recommend it to legislators or Kansas citizens.

Prohibiting courts from exercising judicial review of legislative actions under Article 6 § 6 is inconsistent with the appropriate function of the judicial branch to interpret and apply the Constitution, and to void legislative acts that violate it. Judicial review is a well-settled concept in Kansas law and in state and federal courts across the nation. *Marbury v Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed.60 (1803), established the concept of the supremacy of the federal Constitution, and that "...a legislative act contrary to the Constitution is not law." 5 U.S. (1 Cranch) at 177.

Further, "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each." 5 U.S. (1 Cranch) at 177. Taking away the power of the courts to review the constitutionality of legislative enactments—

even school funding laws—is inconsistent with the principles of *Marbury* and commonly held principles of governance.

Eliminating judicial review is really removal of citizens’ ability to challenge the constitutionality of future school funding laws or policies under Article 6 § 6 and to bring litigation to enforce Article 6 § 6. Removing citizens’ First Amendment rights to petition the government (§ 3 of the Kansas Constitution) is a step in the wrong direction; it is the opposite of democratic government and represents movement towards authoritarianism and consolidation of power. Consolidation of power, at a loss of citizen rights, should be viewed as extremely suspect.

Arguably, there are already implied constitutional prohibitions against school closure throughout Article 6 in the many legislative duties that are currently enumerated, any of which are necessary to keep public schools open in Kansas, and without which, schools would close.¹

Kansas is not alone in facing public school funding challenges or constitutional crises.² However, it would make a difficult situation far worse to recommend to the people of Kansas a policy that erodes the foundations of government, eliminates citizens’ rights, and, ironically, contradicts the lessons on civics that are taught in public schools. On behalf of the members of the Kansas Association for Justice, we recommend your opposition.

¹ See Article 6, which requires the legislature (“shall”) to fulfill a number of constitutional duties related to public education. Section 1 requires the legislature to establish and maintain public schools; section 2 requires the legislature to provide for a state board of education which has general supervision of public schools; section 3 requires the legislature to provide for 10 member districts, each comprised of 4 contiguous senate districts; and section 6 requires the legislature to make suitable provision for finance of the educational interests of the state.

² Forty-six states have had school litigation since the 1970s according to Daniel Thatcher, an education finance specialist with the National Conference of State Legislatures (NCSL). [Schools shutting down? It wouldn’t be the first time it’s happened](http://www.kansas.com/news/politics-government/article82600692.html), *Wichita Eagle*, June 8, 2016, <http://www.kansas.com/news/politics-government/article82600692.html>