



To: Senator Jeff King, Chairman
Representative John Barker, Chairman
Members of the Senate & House Judiciary Committees

From: Callie Jill Denton JD
Executive Director

Date: June 16-17, 2016

RE: Proposed Constitutional Amendment Prohibiting School Closure or Other Potential Constitutional Amendments Pertaining to School Finance

The Kansas Association for Justice (KsAJ) is a statewide, nonprofit organization of trial attorneys. KsAJ has no public policy position on school finance. Our comments are limited to positions on judicial review and the co-equal branches of government.

KsAJ has not had an opportunity to review draft language for a proposed amendment to the Constitution to prohibit school closure. Consequently, we are forced to speculate as to its provisions and the means by which it is implemented.

Arguably, there are already implicit constitutional prohibitions against school closure throughout Article 6 in the many explicit duties that are currently enumerated, any of which are necessary to keep public schools open in Kansas.¹ If a prohibition on school closure is achieved by preventing courts from exercising judicial review of Article 6, it would be a significant deviation from basic tenets of the American form of government that include checks and balances among three separate but co-equal branches. KsAJ strongly recommends against such an amendment.

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

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.

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.

Prohibiting courts from exercising judicial review of legislative actions under Article 6 is inconsistent with the principles of law established in *Marbury* and the appropriate function of the judicial branch to interpret and apply the Constitution, and to void legislative acts that violate it. Eliminating judicial review will eliminate citizens’ ability to challenge the constitutionality of future school funding laws or policies under Article 6 and to bring litigation to enforce Article 6.

Without judicial review, and checks and balances between the legislative and judicial branches, a significant remedy against the legislature’s failure to comply with its constitutional duties in Article 6 will be removed. Although a governor may veto legislation he deems unconstitutional, the legislature may override the governor’s veto; an inferior bill would become law with no additional possibility of review or challenge. Without judicial review of Article 6, there is a significant consolidation of power in the executive and legislative branches, and specifically in the legislative branch, and a significant loss of power to Kansans who desire to challenge the constitutionality of school funding legislation. The consolidation of power should be viewed as especially suspect.

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, 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 support for the co-equal branches of government and the principle of judicial review and your opposition to an amendment that corrodes or diminishes either.

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>