

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.

**SUPPLEMENTAL BRIEF OF APPELLANT
ATTORNEY GENERAL DEREK SCHMIDT**

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

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TABLE OF CONTENTS AND AUTHORITIES

	Page
ARGUMENTS AND AUTHORITIES	1
<i>Arbaugh v. Y&H Corp.</i> , 546 U.S. 500 (2006).....	1, 2
<i>State v. Dunn</i> , 304 Kan. 773, 375 P.3d 332 (2016).....	1
<i>United States v. Wong</i> , 575 U.S. 402 (2015).....	1, 2
<i>Chelf v. State</i> , 46 Kan. App. 2d 522, 263 P.3d 852 (2011).....	2
<i>Bd. of Cty. Comm’rs of Sedgwick Cty. v. City of Park City</i> , 293 Kan. 107, 260 P.3d 387 (2011).....	2
<i>Bowles v. Russell</i> , 551 U.S. 205 (2007).....	2
<i>State v. Sitlington</i> , 291 Kan. 458, 241 P.3d 1003 (2010).....	2
<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385 (1982).....	2, 3
CERTIFICATE OF SERVICE	5

ARGUMENTS AND AUTHORITIES

This Court’s September 17, 2021, order requested supplemental briefing on the following question:

Is a timely request for a hearing under Section 1(c)(1) of 2021 SB 40, L. 2021, ch. 7, § 1(c)(1), to challenge “an action taken, order issued, or policy adopted by” a board of education of a school district, a jurisdictional prerequisite for a civil action under Section 1(d)(1) of 2021 SB 40, L. 2021, ch. 7 § 1(d)(1)?

The Attorney General is unaware of any precedent directly on point, but the relevant authorities suggest that the time period for requesting a hearing is not jurisdictional.

In recent decades, the United States Supreme Court has curtailed its earlier, “profligate” use of the term “jurisdiction.” *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (internal quotation marks omitted); *cf. State v. Dunn*, 304 Kan. 773, 811, 375 P.3d 332 (2016) (overruling decades of case law that previously held charging documents bestowed subject matter jurisdiction on state courts to adjudicate criminal cases, explaining that subject matter jurisdiction arises from the Kansas Constitution). To determine whether an issue is jurisdictional, *Arbaugh* adopted a “readily administrable bright line” rule:

If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

546 U.S. at 515. “And in applying that clear statement rule,” the U.S. Supreme Court has “made plain that most time bars are nonjurisdictional.” *United States v.*

Wong, 575 U.S. 402, 410 (2015) (“Time and again, we have described filing deadlines as ‘quintessential claim-processing rules,’ which ‘seek to promote the orderly progress of litigation,’ but do not deprive a court of authority to hear a case.”); *see also Arbaugh*, 546 U.S. at 510 (“[I]n recent decisions, we have clarified that time prescriptions, however emphatic, are not properly typed ‘jurisdictional.’”). A panel of the Kansas Court of Appeals has followed the reasoning of *Arbaugh*, although in the context of an exhaustion requirement and not a time limitation. *Chelf v. State*, 46 Kan. App. 2d 522, 529-33, 263 P.3d 852 (2011).

On the other hand, both this Court and the U.S. Supreme Court have held that a statutory time period for filing a notice of appeal is jurisdictional. *See Bd. of Cty. Comm’rs of Sedgwick Cty. v. City of Park City*, 293 Kan. 107, 111, 260 P.3d 387 (2011); *Bowles v. Russell*, 551 U.S. 205, 209-13 (2007). But it is also accepted that a statute of limitations is generally *not* jurisdictional. *See State v. Sitlington*, 291 Kan. 458, 463, 241 P.3d 1003 (2010); *Wong*, 575 U.S. at 402 (“Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional”). The time limit in SB 40 for requesting a hearing appears to be more similar to a statute of limitations than a time period for filing a notice of appeal.

The U.S. Supreme Court’s decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is particularly helpful. The question there was whether a statutory deadline for filing a charge with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964 was a jurisdictional prerequisite to

filing a suit in district court. *Id.* at 387-92. The Supreme Court concluded that the time limit for filing a charge with the EEOC was not jurisdictional, but rather “a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.” *Id.* at 393. Although some of the Court’s reasoning was based on the structure and legislative history of Title VII, other parts of the Court’s analysis are relevant here. In particular, the Court found it important that the time limit for filing a charge “appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” *Id.* at 394.

Like the Title VII provisions at issue in *Zipes*, SB 40 sets a time limit for taking some action (in the case of SB 40, requesting a hearing) before a non-judicial entity and then provides for the later filing of a civil action in district court. The time limit for requesting a hearing before the school board appears in a different subsection of SB 40 than the provision authorizing a civil lawsuit (Section 1(c)(1) rather than Section 1(d)(1)), and nothing in the text of SB 40 refers to the time limit for requesting a hearing in jurisdictional terms.

Given these authorities and the fact that the time limit for requesting a hearing more closely resembles a statute of limitations than a deadline for filing a notice of appeal, the Attorney General believes that the 30-day time period in SB 40 for requesting a hearing before the school board is not a jurisdictional prerequisite to bringing a civil action in district court. But if this Court concludes otherwise, that would provide yet another reason (not that one is needed) why the district court

should not have raised and decided constitutional challenges to SB 40, since the district court held that the Plaintiffs had not timely requested a hearing and that holding was not appealed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 4, 2021, the above brief 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:

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