No. 124205

IN THE SUPREME COURT OF THE STATE OF KANSAS

Butler, Kristin, and Bozarth, Scott

Plaintiffs,

v.

Shawnee Mission School District Board of Education

Defendant-Appellee.

Attorney General Derek Schmidt

Intervenor-Appellant.

Brief of *Amicus Curiae* Kansas Justice Institute

Appeal from the District Court of Johnson County, Kansas,
The Honorable David W. Hauber, Judge
District Court Case No. 21CV2385

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1. Identity and Interest of *Amicus Curiae*.

Kansas Justice Institute (KJI) is a non-profit, public-interest litigation firm committed to defending against government overreach and abuse. KJI directly litigates,[1] files *amicus* briefs,[2] and comments on matters of public concern.[3]

KJI's particular interest in *this* case stems from its COVID-19 direct litigation,[4] its COVID-19 litigation by letterhead,[5] and its pandemic-related commentary.[6]

It is beyond question COVID-19 is serious and the government has a prominent and important role in public health matters. KJI firmly believes that when the government wields those powers though, the people affected should be afforded a prompt and meaningful hearing—a simple, yet effective remedy against potential government overreach. The Legislature created such a hearing process in Kan. Leg. 2021 SB 40 (SB 40).

2. Introduction.

The district court's order declaring SB 40 unconstitutional was premised on a good faith but mistaken appreciation of the Act's intent, effect, and importance. This brief provides a practical and contextual countervailing position—that SB 40 was an appropriate legislative response to Kansas' outdated public health statutes. This brief focuses on Kansas' local health

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[1] *Bunner, et al., v. Beam*, 2019-cv-000785 (Shawnee County); *Modi, et al., v. Kansas State Board of Cosmetology, et al.*, 2020-cv-000595 (Shawnee County).

[2] *Salgado v. United States*, 140 S. Ct. 2640 (2020), review denied; *State v. Hayes*, 459 P.3d 213 (Kan. Ct. App. 2020), review denied (Sept. 29, 2020); *State v. 1959 Corvette, et al.*, 2017-cv-002347 (Johnson County).

[3] *Kansas' Unjust Forfeiture Law Amounts to Policing for Profit*, KANSAS CITY STAR (May 21, 2019); *Asset Forfeiture Law Needs Reform in Kansas*, WICHITA EAGLE (July 6, 2019).

[4] *Taylor, et al., v. Allen, M.D., et al*, 2:20-cv-02238 (D. Kan); *Ricky Dean's, Inc., d/b/a The Sandbar, et al., v. Marcellino, M.D., et al.*, 5:20-cv-04063 (D. Kan).

[5] *See, e.g., Letter from KJI to Osage County Health Department* (April 20, 2020) (accessible at https://kansasjusticeinstitute.org/first-amendment-sowers/); *Letter from KJI to Osage County Health Department*, (April 21, 2020) (accessible at https://kansasjusticeinstitute.org/first-amendment-sowers/); *Letter from KJI to Clay County Counselor* (July 10, 2020) (accessible https://kansasjusticeinstitute.org/clay-county-parks-dept/); *Letter from KJI to Riley County Counselor* (Aug. 5, 2020) (accessible at https://kansasjusticeinstitute.org/riley-county-health-dept/); *Letter from KJI to Dickinson County Counselor* (Jan. 21, 2021) (accessible at https://kansasjusticeinstitute.org/religious-liberty/)

[6] *Constitution can handle virus challenges*, TOPEKA CAPITAL-JOURNAL (March 31, 2020); *Constitutional rights more important than ever*, TOPEKA CAPITAL-JOURNAL (April 25, 2020).

officer regime—which the district court also declared unconstitutional—and is divided into three parts. The first provides a brief overview of Kansas' local health officer statutes; the second recounts the various responses to COVID-19 by local health officers; and the third explains why SB 40's hearing process warrants affirmation, not criticism.

3. Kansas' Local Health Officer Regime Before SB 40: A Brief Background.

In March 2020, local health officers were—by statute—charged with "exercise[ing] and maintain[ing] a supervision" over infectious or contagious disease cases, "seeing that all such cases are properly cared for[.]" KSA § 65-119(a). The Legislature empowered local health officers to "prohibit public gatherings" (KSA § 65-119) and "use all known measures" to prevent the spread of such cases (*see* KSA § 65-202).

At the same time, the Legislature also empowered local health officers to issue isolation or quarantine orders. The quarantine process is outlined in KSA §§ 65-129b and 129c. The statutes empower local health officers to issue quarantine orders under certain, limited, circumstances—they must be "medically necessary." KSA § 65-129b(a)(1)(B). Individuals isolated or quarantined may request "a hearing in district court contesting the isolation or quarantine[.]" KSA § 65-129c(d)(1). Courts "shall appoint counsel" to represent individuals who "are not otherwise represented by counsel." KSA § 65-129c(d)(10). A challenge to the health officer's quarantine order must take place within 72-hours (KSA § 65-129c(d)(3)) absent extraordinary circumstances (KSA § 65-129c(d)(4)(A)). The court must lift the quarantine order "unless the court determines that the isolation or quarantine order is necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease." KSA § 65-129c(d)(4)(C)(i).

Before SB 40, local health officers primarily—if not exclusively—relied on KSA § 65-119 and KSA § 65-202 to issue their COVID-19 orders. The next section briefly examines some of the statutes' legislative history to put SB 40 in the proper context.[7]

3.1. KSA § 65-119: Kansas' "Prohibit Public Gatherings" Statute.

In 1901, if a disease "show[ed] a tendency to become epidemic," local health officers were required to close "public and private schools," and in "extreme cases, church services suspended and public assemblages of people at shows, circuses, theatres, fairs or other gatherings prohibited." KSA § 65-119, L. 1901, ch. 285. The Legislature amended the statute in 1953. Local health officers were "empowered and authorized to prohibit public gatherings when necessary for the control of any and all communicable disease." KSA § 65-119, L. 1953, ch. 283.

3.2. KSA § 65-202: Kansas' "All Known Measures" Statute.

In 1927, the Legislature amended KSA § 65-202 to read: local health officers "shall make a personal investigation of each case of smallpox, diphtheria, typhoid fever, scarlet fever, acute anterior poliomyelitis (infantile paralysis), epidemic cerebrospinal meningitis and such other acute infectious, contagious or communicable diseases as may be required, and shall use all known measures to prevent their spread, and shall perform such other duties as this act, his local board, or the state board of health may require of him: *Provided, however,* That such inspection or investigation shall not be made in any case which has been reported to the proper health authorities as required by law, and where quarantine regulations have not been infringed upon." KSA § 65-202, L. 1927 ch. 240 (underline added, italics in original).

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[7] For a more robust background on Kansas' public health statutes, *see* Robert W. Parnacott, *Anthrax, Smallpox, and Flu, Oh My! The Law of Infectious Disease Control in Kansas*, J. Kan. B. Assn. (Oct. 2009); Robert W. Parnacott, *COVID-19: An Update on the Law of Infectious Disease in Kansas*, J. Kan. B. Assn. (June 2020).

3.3. Local Health Officers' Powers as They Existed in March 2020.

So, to recap, by the time COVID-19 hit Kansas—in March 2020—the Legislature had granted local health officers incredibly broad powers. They could "prohibit public gatherings" (KSA § 65-119), "use all known measures" (KSA § 65-202), and "isolate" (KSA § 65-129b) or "quarantine" (KSA § 65-129b) individuals.

An order "prohibit[ing] public gatherings" was statutorily enforceable, but an "all known measures" order was not. *See* KSA § 65-127. Neither phrase, "prohibit public gatherings," or "use all known measures" was statutorily defined.

Those impacted by public-gathering bans, or all-known-measures orders, were not afforded a hearing process, but quarantined or isolated individuals were.

4. Local Health Officers' Responses to COVID-19: A Plethora of Health Orders.

It is beyond question that COVID-19 is serious, the government has a prominent and important role in public health matters, and local health officers issued their orders with the best of intentions. However, health officers wielded their powers aggressively, frequently, and at times, unreasonably.

Health officer(s):

- banned car parades and joyriding regardless of social distancing;[8]
- required physicians, lawyers, banks, dentists, restaurants, and others to compile and disclose upon demand, for any reason, a list of their patrons, patients, and clients.[9]
- compelled restaurants and bars to "screen" and document their employees' travel history, their interactions, their temperatures, and then required the bars to disclose the sensitive documents for any reason, upon demand.[10]

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[8] *Letters to Osage County Health Department, supra.*
[9] *Taylor, et al., v. Allen, M.D., et al*, 2:20-cv-02238 (D. Kan).
[10] *Letter from KJI to Riley County Counselor, supra.*

- capped religious gatherings at 25% of the applicable fire code but permitted retail stores to operate at 50%.[11]

- prevented tattoo parlors, nail salons, barbershops, and hair salons from taking walk-up customers, but not customers that had an appointment or "text message" check-in.[12]

- required restaurants and bars to stop serving alcohol at 11:00 p.m., regardless of the bars' COVID-19 mitigation procedures and protocols; prohibited bars from utilizing outdoor seating after midnight but permitted indoor restaurants without a liquor license to remain open after midnight; permitted curbside food sales after 11:00 p.m., but not curbside alcohol sales.[13]

- banned dancing.[14]

- prohibited standing, except for "entering/exiting the business or visiting a restroom facility."[15]

- closed fitness center locker rooms, "except for when a portion of a locker room may be necessary to remain open for use as restroom facilities."[16]

In *these* orders—and the hundreds of others not listed—there were no readily apparent scientific explanations for their specific mandates. Take bar curfews, for example. The orders never explained the scientific basis for closing bars' *outdoor* seating after 11:00 p.m. while simultaneously allowing some indoor restaurants to remain open later than 11:00 p.m.; or explained why bars were prohibited from offering curbside delivery of alcoholic beverages at certain times, but some restaurants could offer curbside food delivery. The orders did not demonstrate any causal relationship between alcohol sales after 11:00 p.m. and the transmission of COVID-19.

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[11] *Letter from KJI to Dickinson County Counselor, supra.*
[12] Johnson County Local Health Order, Issued March 25, 2021.
[13] *Ricky Dean's, Inc.,* 5:20-cv-04063 (D. Kan).
[14] Hailey Dixon, *Gibbs issues new health order prohibiting dancing at bars*, MANHATTAN MERCURY (July 20, 2020).
[15] *Ricky Dean's, Inc.,* 5:20-cv-04063 (D. Kan) (Doc. 13-1).
[16] Dickinson County Local Order, #DK11-02.

The orders did not provide *any* post-issuance relief either. Businesses impacted by these health orders had no choice but to comply, or risk fines, prosecution, or immediate and potentially permanent closure, regardless of their COVID-19 mitigation procedures and protocols.

These orders raised serious constitutional issues. Can local health officers create and implement *bar curfews* under their power to "prohibit public gatherings," for example? If so, is the statute constitutional? And if it *is* constitutional, do business owners have the *constitutional* right to post-deprivation hearings?

5. Meaningful and Timely Hearings Are Always Important, Especially So During Emergencies.

The Fourteenth Amendment to the United States Constitution provides for procedural due process protections. *See, e.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

Constitutional procedural due process affords citizens meaningful and timely hearings, the point of which is to minimize the risk of mistaken deprivations of liberty or property. *See Mathews*, 424 U.S. at 335. Meaningful and timely hearings are even *more* important during times of hardship. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.").

Whether the *constitutional* right to procedural due process existed in the context of local health orders was actively being litigated in federal court when the Legislature created its own

meaningful and timely hearing process under SB 40. *See Ricky Dean's, Inc., d/b/a The Sandbar, et al., v. Marcellino, M.D., et al.*, 5:20-cv-04063 (D. Kan).

6. The Legislature Creates a Meaningful and Timely Hearing Process for Everyday Kansans by Enacting SB 40.

The Legislature responded to the outdated local health officer regime—and the resultant health orders—by enacting SB 40.

Under SB 40, local health officers are empowered to propose health orders that limit gathering sizes, curtail business operations, control the movement of a county's population, mandate mask-wearing, or limit religious gatherings (SB 40, § 12(b)(2)), if they believe such orders are "necessary." (*Id.*) They propose the orders to the board of county commissioners, and if adopted, the health orders go into effect. *Id.*

A person "aggrieved" by a health order may file a "civil action" in state district court. *Id.*, § 12(d)(1). The hearing must occur "within 72 hours." *Id.* At the hearing, the local health officer must establish their health order was "narrowly tailored" (*id.*) and used the "least restrictive means." (*Id.*) Otherwise, the aggrieved party is entitled to relief. *Id. This* hearing process is—in many ways—comparable to the hearing process for isolation and quarantine orders.

All of this suggests the district court premised its ruling on a good faith but mistaken understanding about the Act's intent, effect, and purpose. Throughout the ruling, the district court repeatedly analyzed the Act through a "fundamental rights" lens: SB 40 "creat[es] burdens of proof that are not justified by undefined rights" (*Judgment and Final Order After Intervention by the Kansas Attorney General* (*Order*), page 7);[17] SB 40 "displays no rigor to identify any fundamental right" (*Order*, page 17); "SB 40 does not define what fundamental

[17] *Amicus* does not have access to the record on appeal. According to the table of contents electronically filed in the district court, however, the district court's *Order* appears to be located in Volume 2, page 66.

rights are at stake" (*Order*, page 4, FN7); "[o]rdinarily, a plaintiff is required to plead some right that has been infringed upon. But SB 40 simply assumes that so long as a person is 'aggrieved' by anything it triggers a right to a hearing and immediate decision" (*id.*, page 17).

The premise misses the mark. SB 40 is *not* a fundamental rights statute. Instead, it is the legislative recalibration of the local health officer regime in response to the myriad of orders throughout the pandemic. Before, health orders impacting business operations did not afford statutory hearings, now they do. The Legislature created the local health officer regime *decades* before, and SB 40 simply modernized the process to fit today's needs.

Next, the district court appears to suggest this statutory hearing process is intrinsically problematic: "SB 40 actually hobbled local pandemic measures by ensuring that lawsuits would be filed, aided by swift court action. Many local units of government simply capitulated under the pressure." *Order*, page 6. "The primary impact of SB 40, it seems, has nothing to do with local control but, rather, eliminating the same." *Order*, page 6, FN 12.

To put SB 40 in its proper context, two points bear repeating. Meaningful and timely hearings are particularly important during emergencies, even during the COVID-19 pandemic. When a local health officer issues an order affecting a person's livelihood—even with the best of intentions—that person should have the opportunity to be heard. A hearing process reduces the likelihood of a mistaken deprivation and promotes respect for the law.

If it is true—that the government "simply capitulated"—because of a hearing process, perhaps that is a better indicator that the public health orders were too broad or too arbitrary to begin with. There would be no reason to withdraw a health order if a local health officer reasonably believed it was scientifically justified and appropriately tailored.

In short, SB 40's hearing process should be celebrated, not criticized. Without it, everyday citizens were left without a voice, and without an opportunity for a meaningful and timely hearing.

7. Conclusion.

A meaningful hearing process is reasonable, appropriate, and necessary. It serves as a modest check against government overreach. It is even more important during public health emergencies.

Dated: August 27, 2021.

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