

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.

REPLY TO AMICUS BRIEFS

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

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ARGUMENTS AND AUTHORITIES

The amicus briefs supporting the district court’s decision largely raise arguments that have already been addressed and warrant no further response. To the extent the amicus briefs attempt to raise new arguments, those arguments are not properly before this Court. *See Sierra Club v. Moser*, 298 Kan. 22, 87-88, 310 P.3d 360 (2013) (“Kansas appellate procedure does not allow a nonparty, including an amicus curiae, to raise an issue for appellate review.”). For example, the Kansas Association of School Board Legal Assistance Fund and Governor Kelly both argue that the Legislature lacked authority to require that pandemic restrictions taken by a school board be “narrowly tailored to respond to the state of disaster emergency and use[] the least restrictive means to achieve such purpose.” SB 40, § 1(d)(1). But while both the district court and the Shawnee Mission School District seemed to have policy concerns with this standard, neither identified any constitutional problem with it. Accordingly, amici cannot raise constitutional challenges to this standard. Likewise, the Governor’s amicus brief improperly attempts to assert an argument under Article 6 of the Kansas Constitution when neither the district court nor the Shawnee Mission School District raised an Article 6 claim.¹

Three other points warrant a brief response. First, the Governor’s amicus brief argues that this case is not moot because plaintiffs could allegedly seek

¹ Not only that, but Article 6 is only relevant to Section 1 of SB 40, which has expired. The primary argument that this case is not moot rests on other provisions of SB 40 governing cities and counties, which have no authority under Article 6 of the Kansas Constitution.

damages under SB 40 for past pandemic restrictions. *See* Governor’s Amicus Br. at 4. But nothing in the text of SB 40 authorizes a damages remedy. And it is well-established that courts should not “read into [a] statute something not readily found in it.” *Matter of A.B.*, 313 Kan. 135, 141, 484 P.3d 226 (2021). Because SB 40 does not authorize money damages for past conduct and Section 1 has now expired, any constitutional challenge to Section 1 is moot.

Second, Governor Kelly’s amicus brief cites two lawsuits filed under Section 12 of SB 40 as a reason why she believes this case is not moot. *See* Governor’s Amicus Br. at 4. But in both of the cases the Governor cites, the plaintiffs waived their rights to a hearing and a decision within the statutory timeframes, thus rendering it unnecessary to determine whether those timelines are constitutional. *See* Governor’s Amicus Br. at App. 4, 10. In addition, both cases have been resolved without any consideration of the constitutionality of the timelines: The Johnson County case was dismissed by joint stipulation (Attachment A), and in the Morris County case, the district court upheld the challenged mask mandate (Attachment B). It is far from clear that the constitutionality of these timelines will ever become an issue. And it is certain that a constitutional challenge to the timelines in Section 1—which is the only statutory provision at issue here—will never recur because that section has expired.

Finally, the Governor’s argument regarding the SB 40 standard, in addition to not being properly before this Court, is meritless. She cites *City of Boerne v. Flores*, 521 U.S. 507 (1997), but the question in that case was whether the Religious

Freedom Restoration Act was within the scope of Congress’s enumerated powers under Section 5 of the Fourteenth Amendment, a question that has no relevance here. *Id.* at 516-17. *City of Boerne* did not identify any constitutional problem with Congress imposing a strict scrutiny standard when acting within the scope of its enumerated authority, *see, e.g., Cutter v. Wilkinson*, 544 U.S. 709 (2005) (rejecting an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act, which was passed under Congress’s Spending and Commerce Clause powers), or any constitutional problem with States imposing a strict scrutiny standard to protect religious freedom, as Kansas and many other States have done, *see* K.S.A. 60-5303. Any argument that the Legislature cannot provide greater protection for certain rights than the Constitution provides is not well thought out. After all—to give just one more example—the Constitution only imposes a rational basis standard for differential treatment of disabled individuals. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). But the Legislature, like Congress at the federal level, has provided greater statutory protections. *See* K.S.A. 44-1001 *et seq.* Under Governor Kelly’s flawed theory, these protections would be unconstitutional.

The amicus briefs offer no support for the district court’s decision, which should be reversed for the reasons previously explained.

Respectfully submitted,

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I certify that on October 15, 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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Attachment A

**IN THE DISTRICT COURT JOHNSON COUNTY
TENTH JUDICIAL DISTRICT OF KANSAS**

M. M. C., by and through her next friend,)
B. C., her parent;)
)
Petitioner,)
)
v.)
)
THE BOARD OF COUNTY)
COMMISSIONERS OF JOHNSON COUNTY,)
KANSAS *in their official capacity.*)
)
Defendants.)
_____)

Case No. 2021-CV-04112

JOINT STIPULATION OF DISMISSAL

The parties hereby notify the Court that they have reached an agreement to dismiss the above-captioned action.

Accordingly, pursuant to K.S.A. 60-241(a)(1)(A)(ii), Plaintiff M.M.C. and Defendant the Board of County Commissioners of Johnson County file this joint stipulation of dismissal without prejudice. The parties agree to bear their own fees and expenses in this matter.

Dated: September 16, 2021
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Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record have been served with a copy of this document via e-mail the date on the foregoing file-stamp.

By: /s/ Ryan A. Kriegshauser
Attorney for the Plaintiff

Attachment B

**IN THE DISTRICT COURT OF MORRIS COUNTY, KANSAS
EIGHTH JUDICIAL DISTRICT OF KANSAS**

NEIL LITKE,)	
Plaintiff,)	
)	
vs.)	Case No. MR 2021 CV 13
)	
THE BOARD OF COUNTY)	
COMMISSIONERS OF MORRIS COUNTY,)	
KANSAS, <i>in their official capacity,</i>)	
Defendant.)	

ORDER

NOW, on this the 13th day of September, 2021, the Court denies the relief requested by the Plaintiff.

On September 3, 2021 at 1:16 PM, the Plaintiff, Neil Litke (Litke) filed a Petition in the Morris County District Court pursuant to Senate Bill 40 (SB 40 and Kansas Supreme Court Administrative Order 2021-RL-032. Litke's Petition was a response to a Health Order issued by Morris County Health Officer, Dr. Frese, and adopted by the Morris County Board of Commissioners (Board) on August 4, 2021. The Board was served on September 3, 2021. The Board timely filed its answer on September 7, 2021 at 9:14 AM. (KSA-60-206(a)(2)(c)).

The Court conducted a brief Pretrial/Scheduling Conference with counsel for both parties on September 7, 2021 at 11:45 AM. The parties were ordered to submit witness and exhibit lists. The Trial took place timely via Zoom on September 7, 2021 at 1:00 PM within the time constraints set forth in SB 40, Sec. 12. Litke appeared via Zoom as did

his attorneys, Joshua A. Ney and Ryan K. Krieghauser, of the Krieghauser Ney Law Group. The Board appeared by and through attorney, William A. Kassebaum, Morris County Counselor, via Zoom.

The Board presented Dr. Frese, Morris County Health Officer, and Kevin Leeper, Morris County Hospital Administrator as witnesses. Litke testified for Plaintiff. Court admitted Defendant's Exhibit #1 without objection.

The Court ordered the parties to submit Findings of Fact by 5:00 PM on September 9, 2021.

The Court makes the following Findings of Fact:

1. Litke is a resident of Morris County, Kansas.
2. Dr. Frese, MD., is a licensed practicing physician.
3. Pursuant to KSA 65-201(a) the Board had appointed Dr. Frese as the Morris County Health Officer.
4. Dr. Frese issued a Morris County wide mask ordinance which was adopted and approved by the Morris County Commissioners on August 4, 2021. (See Mask Order attached to Litke's Petition.)
5. The Mask Order is an Order that qualifies as an Order under SB 40, Sec. 12(d).
6. There have been 748 COVID cases and 23 COVID deaths in Morris County. (See Defendant's Exhibit #1.)
7. Morris County's recent 7-day metric on CDC website shows 14 cases, 10.29% positivity rate, eight (8) new hospital admissions, and 54.5 of the eligible Morris County population is not vaccinated.

8. CDC rates US counties into four (4) categories: Low, Moderate, Substantial, and High. The rate of transmission is based on new cases per 100,000 people. Morris County is in the High category.
9. Vaccination takes six (6) weeks for an individual to be fully vaccinated.
10. COVID pandemic has escalated to the point that all referral hospitals are full and not accepting patients.
11. Individuals with Non-COVID illness such as heart conditions and strokes, can not be sent to the appropriate referring hospital because there are no beds.
12. That Dr. Frese and Kevin Leeper monitor the referring hospitals often.
13. Requiring individuals to mask is the quickest and most effective tactic to reduce the spread of COVID.
14. The Delta Variant is three (3) times more transmissible.
15. That there was not a numerical statistic that Dr. Frese relied upon. Dr. Frese considered trends including number of positive cases in Morris County, number of hospitalized, and number of hospital beds available.
16. Dr. Frese testified this was a long process, that there were many meetings prior to August 4, 2021 with the Board.
17. Dr. Frese did not know the specific number of beds available at the hospital.
18. Dr. Frese stated they tried to convince the public to wear masks without a Mask Order, but people were too selfish to comply.
19. Vaccinations will take two (2) months to be effective, while masks can be effective immediately.

20. A COVID carrier without a mask has a 70% chance of transmitting the virus to a healthy person. A COVID carrier with a mask has a 1.5% chance of transmitting the virus.
21. The Mask Order will be rescinded or scaled back when Dr. Frese sees fewer cases, trends show progress, and more hospital beds available.
22. There is no expiration date of the Mask Order, it depends on the number of cases, vaccination rate, and availability of referral hospitals.
23. Litke is engaged in civic activities of shopping, attending children's events, and public events.
24. Order obligates Litke to wear a mask throughout the day.
25. Litke believes in freedom and that one (1) individual, Dr. Frese, should not be able to infringe upon his freedom.
26. Litke believes there should be a time limit set on the Mask Order. The indefinite period of time makes him unable to challenge the Mask Order.
27. Dr. Frese did not consider religious exemptions, indoor exercise, or swimming.
28. Order applies to all indoor spaces and outdoor if individuals can't exercise six (6) foot social distancing.
29. Litke believes there is no exemption for private offices.
30. Law Enforcement in Morris County refuses to enforce the mask ordinance.

CONCLUSIONS OF LAW

Litke claims he is aggrieved a result of the mask ordinance in Morris County. SB 40, Sec. 12(d)(1) states:

“Any party aggrieved by an order issued pursuant to subsection (b)(2) may file a civil action in the district court of the county in which the order was issued within 30 days after such order is issued.”

Subsection (b)(2) of SB 40, Section 12 states:

“if a local health officer determines it is necessary to issue an order mandating the wearing of face masks...”

Both parties agree the Morris County Order is an order defined by SB 40, Sec. 12(b)(2), and is subject to be challenged by (d)(1) of the same section. The time constraints as set forth in SB 40 have been met by each party.

Litke alleges that the Mask Order is not narrowly tailored to the purpose stated in the Order and does not use the least restricting means to achieve such purpose. Litke argues the lack of a time limit makes this Order indefinite and not subject to challenge. Litke suggests reviewing the Order every 30 days would be less restrictive and it would allow an aggrieved party to challenge the issuance of a new order every 30 days. This argument by Litke fails.

SB 40, Section 12(b)(1) reads:

“Except as provided in paragraph (2), any order issued by the local health officer, including orders issued as a result of an executive order of the governor, may be reviewed, amended or revoked by the board of county commissioners. Any order reviewed or amended by the board shall include an expiration date...”

The plain language of (b)(1), “Except as provided in paragraph (2)” clearly indicates that expiration dates are not required with mask orders. (b)(1) explicitly exempts the mask order from the requirement of expiration dates.

The logic is clear as Dr. Frese testified there is great difficulty in determining when this COVID pandemic will decline. By exempting the expiration date from (b)(2),

it is clear the Kansas Legislature also thought mask orders must be dealt with without a time limit.

Pursuant to (d)(1) a “court shall grant the request for relief unless the court finds such order is narrowly tailored to the purpose stated in the order and uses the least restrictive means to achieve such purpose.” The purpose of the Mask Order is to prevent the spread of COVID in Morris County and to protect its citizens.

From the evidence produced by witnesses and Defendant’s Exhibit #1, there is no doubt Morris County has a sincere need to prevent the COVID spread. Dr. Frese testified to the escalating cases in Morris County, coupled with 55% of eligible residents being unvaccinated. Dr. Frese and Kevin Leeper discussed the lack of hospital beds not only in Morris County, but in its referral hospitals, putting health compromised residents of Morris County in danger.

The use of vaccinations is the most effective but could take up to 8 weeks to be effective. Requiring individuals to either be vaccinated or show proof of vaccination is certainly more restrictive than the Mask Order. Dr. Frese discussed that the Morris County Health Department public relations request to wear masks had fallen on deaf ears. The mask ordinance is the least restrictive tool that Morris County has to prevent the spread of COVID.

Litke alleges the Order is not narrowly tailored. That there are not exemptions for swimming, religious activity, private offices, protect constitutional free speech, or strenuous exercise. The testimony Litke offers is that he doesn’t like wearing a mask while shopping in the grocery store, watching his kids play volleyball, basketball, or working out. The mask does not prevent Litke from doing any of these activities. The

masks do prevent the spread of COVID carries to 1.5% chance compared to 70% chance without a mask.

Litke also argues the lack of expiration date proves it is not narrowly tailored. However, as set forth earlier, the legislature exempted the mask order from an expiration date. Dr. Frese testified that setting an expiration date is arbitrary with reviewing trends, positive test numbers, hospitalization numbers, and space at referring hospitals. It is a fluid situation that must be monitored closely.

Litke wants to be heard and the Court certainly appreciates this desire. Litke wants a new Mask Order every 30 days so that a new appeal could be filed. Litke has the ability to attend Board meetings and question and challenge the Board.

Litke challenges the Mask Order is too broad because it does not exempt swimming, religious activity, private offices, or indoor exercising. The Court agrees with Dr. Frese, that common sense must be applied. There is not one (1) thing in the Mask Order that prevents Litke from doing any of these activities.


The Mask Order states, "All businesses and organizations in Morris County must require all employees, customers, visitors, members or members of public to wear a mask or face covering inside public spaces." A private office is not a public place and therefore not subject to the Mask Order.

Litke does not provide any suggestive language on how the Order needs to be narrowed, only broad conclusions. Litke failed to prove the Mask Order is not narrowly tailored.

The Court finds the Morris County Board of Commissioners and the Morris County Health Office, that Dr. Frese's Mask Order is narrowly tailored to prevent the spread of COVID and is the most restrictive means to achieve this purpose.

IT IS SO ORDERED.

Done in Chambers on the 14th day of September, 2021.



BEN J. SEXTON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I, Connie J. Franklin, do hereby certify that a true and correct copy of the above and foregoing Order was forwarded by: () placing the same in the U.S. Mail, first-class postage prepaid; () in the Court Mailbox; () facsimile transmission; () hand delivery; (X) e-mail; or () electronically served via eFlex filing system, on the 14th day of September, 2021 to:

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