



KANSAS JUSTICE INSTITUTE

January 21, 2021

Via Electronic Mail Only

Dr. Brian Holmes
Dickinson County Local Health Officer
1001 N. Brady
Abilene, Kansas 67410

Re: Dickinson County Health Order #DK11-02

Dear Dr. Holmes,

Kansas Justice Institute¹ sends this letter in good faith. In our view, Health Order #DK11-02 raises serious statutory and constitutional issues requiring immediate remedial action. If, after reviewing this correspondence you wish to discuss this matter, please call me. I would be more than happy to have a conversation. If it is more convenient for you, I am willing to meet with you at your office.

On April 30, 2020, Governor Kelly publicly declared her intention to end the statewide stay at home order. Moments later, KJI sent you a letter thanking you for your dedication to public health, acknowledging the value of your work, and said, in part:

As you embark on the monumental task of deciding whether to impose a local health order, Kansas Justice Institute respectfully asks you to carefully consider the following.

The COVID-19 pandemic, while serious, does not justify a potential local health order that violates the United States or Kansas Constitutions. It is just as important now, perhaps more so, to follow the rule of law. As a Kansas Supreme Court justice said recently, “public officials have an ongoing duty to adhere to the law. This duty doesn’t evaporate in a crisis—in fact, a crisis may heighten the duty.”

For example, a health order that limits speech raises serious constitutional issues. Courts have been crystal clear: any prior restraint of speech and expression bears a heavy presumption of invalidity. Similarly, a health order that

¹ Kansas Justice Institute is a non-profit, public-interest litigation firm committed to protecting individual liberty and the constitutional rights of all Kansans.

severely, unreasonably, and/or arbitrarily restricts the right to assemble, or travel, implicates constitutional rights. In our view, a local health order should be narrowly tailored and use the least restrictive means possible to achieve its purpose.

In short, constitutional rights still exist during a pandemic. This analysis was buttressed by a federal court in Wichita, Kansas, recently. In that case, the court issued an emergency temporary restraining order involving social distancing and constitutional rights. *See First Baptist Church v. Governor Laura Kelly*, No. 6:20-cv-01102-JWB-GEB (D. Kan., Apr. 18, 2020) (Doc. 14).

Of course, the rights and issues mentioned here are not exclusive. We do not mean to imply these are the only rights worthy of protection, or that you are even considering such an improper order. We simply ask that you carefully take into consideration these general issues as you move forward.

Since our letter to you, much has changed but the United States and Kansas Constitutions have not. Rights still exist and the constitutions still apply, even during the COVID-19 pandemic. As previously mentioned, we are writing to you in connection with Health Order #DK11-02.²

According to Health Order #DK11-02, religious gatherings are capped at 25% of the applicable fire code³ but retail stores are free to operate at 50% capacity.⁴ Polling places, licensed childcare facilities, schools, and court facilities are exempted from the occupancy limitations altogether.⁵ The occupancy limitations for religious institutions strikes us as unconstitutional under the Kansas Constitution, the Kansas Preservation of Religious Freedom Act, and the First Amendment to the United States Constitution.

The Kansas Constitution Bill of Rights provides even greater free-exercise protection than the First Amendment to the United States Constitution. *Stinemetz v. Kansas Health Policy Auth.*, 45 Kan.App.2d 818 (2011). Any local health order that substantially burdens the free exercise of religion must pass strict scrutiny, the most stringent review available. It requires the government to prove, by clear and convincing evidence, a compelling justification for the

² If you feel anything in this letter is inaccurate, or we have misunderstood the situation, please advise immediately. Please set forth the accurate facts.

³ “Mass gatherings within specific enclosed, confined or designated public spaces, whether indoors or outdoors, shall be limited to 25% of the capacity permitted under the applicable fire code, and subject to the requirement within Section II.1. and Section II.2. of the order that individuals must maintain 6 feet of social distance.” Health Order #DK11-02, Sec. II.4.

⁴ “[R]etail stores shall be limited to 50% of the capacity permitted under the applicable fire code.” Health Order #DK11-02, Sec. II.6.

⁵ Health Order #DK11-02, Sec. II.8. (“The following are exempt from the mass gathering limitations in Section II.4. of this Order, and are instead encouraged to maintain social distancing as much as feasible and to maintain 6 feet of social distance between individuals who do not reside together, when feasible: a. Election polling places[,] b. Licensed childcare facilities[,] c. Schools[,] d. Court facilities[.]”)

particular burden imposed; and, that the government has used the “least restrictive means” possible to accomplish that purpose.⁶

Under the First Amendment, “narrow tailoring requires the government to demonstrate that a policy is the least restrictive means of achieving its objective. The government’s justification must be genuine, not hypothesized or invented post hoc in response to litigation. And the government must show that it seriously undertook to address the problem with less intrusive tools readily available to it. In short, to meet the requirement of narrow tailoring, the government must demonstrate that alternative measures imposing lesser burdens on religious liberty would fail to achieve the government’s interests, not simply that the chosen route was easier.” *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (cleaned up). The government must meet this burden even during a pandemic. *Id.*

Again, in our view, the health order’s religious gathering limitations violate the Kansas Constitution, the Kansas Preservation of Religious Freedom Act, and the First Amendment to the United States Constitution.⁷ In short, the religious gathering limitations are not narrowly tailored to serve a compelling governmental interest.

Although analyzing the First Amendment, not the Kansas Constitution, Justice Gorsuch recently said the “[g]overnment is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (J., Gorsuch, concurring) (cleaned up).

No reasonable person can credibly deny COVID-19 is a serious public health issue that demands serious attention. Dickinson County should be commended for some of its policies to ensure the safety of its community. Although serious, COVID-19 does not excuse violating religious freedoms. As Justice Brandeis said almost 100 years ago, “[d]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (J., Brandeis, dissenting).

In conclusion, we urge you to immediately reconsider your decision to impose what in our view amounts to an arbitrary and unconstitutional impediment to the free exercise of religion.

⁶ See Kansas Preservation of Religious Freedom Act, KSA 60-5301 et seq.; See also *Stinemetz*.

⁷ The analysis in this letter is not exhaustive. There are other problems with the order that are not discussed here.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel G. MacRoberts". The signature is stylized and cursive.

Samuel G. MacRoberts

Litigation Director

Kansas Justice Institute

12980 Metcalf Avenue, Suite 130

Overland Park, Kansas 66213

Sam.MacRoberts@KansasJusticeInstitute.org

(913) 213-5018

Cc: Lynn Peterson - Dickinson County Commissioner
Ron Roller - Dickinson County Commissioner
Craig Chamberlin - Dickinson County Commissioner